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**Supreme Court of the United States**

**OCTOBER TERM, 1963**

**No. 406**

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**RED BALL MOTOR FREIGHT, INC., ET AL.,  
APPELLANTS,**

**vs.**

**EMMA SHANNON, ET AL., ETC.**

---

**No. 421**

---

**UNITED STATES AND INTERSTATE COMMERCE  
COMMISSION, APPELLANTS,**

**vs.**

**EMMA SHANNON, ET AL., ETC.**

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**APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TEXAS**

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**NO. 406 FILED AUGUST 26, 1963**

**NO. 421 FILED AUGUST 30, 1963**

**PROBABLE JURISDICTION NOTED NOVEMBER 12, 1963**

# Supreme Court of the United States

OCTOBER TERM, 1963

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TEXAS

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Division

Complaint

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R. J. Mittelbronn, Hearing Examiner, with

Notice to Parties, served August 29, 1957

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

Civil Action No. 2840

---

**EMMA SHANNON and RICHARD J. SHANNON**  
d/b/a E. and R. SHANNON

vs.

**UNITED STATES OF AMERICA**  
and  
**INTERSTATE COMMERCE COMMISSION**

---

COMPLAINT—Filed May 25, 1960

To the Honorable Judge of Said Court:

Now come Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, both of whom reside in San Antonio, Bexar County, Texas, hereinafter called plaintiff and present this complaint against United States of America and Interstate Commerce Commission, and for such complaint respectfully state:

1.

That E. and R. Shannon was a partnership with E. Shannon being dead prior to November 5, 1956, the date upon which the Bureau of Inquiry and Compliance of the Interstate Commerce Commission instituted, on its own initiative under the appropriate section of the Interstate Commerce Act (U.S. Code, Title 49, Sec. 304 (c)) an investigation of the operations of such above named entity, the final order of said Interstate Commerce Commission concerning such investigation, being the subject matter of this action and the order of which plaintiff seeks to enjoin the enforcement, such matter being numbered before such Interstate Com-



merce Commission as MC-C-2055. For some reason such cause was decided together with cause number MC-C-1994 styled *Fraering Brokerage Company, Inc., Investigation of Operations*, but such matters were not heard together nor [fol. 2] connected in any way except possibly that the decision of both cases together was more convenient for the Interstate Commerce Commission. That Emma Shannon inherited part of the interest of her deceased husband, E. Shannon in such business above described, but never took any active interest in such business and was in fact a woman of approximately 80 years of age at the time of the institution of the above referred to investigation. That subsequent to the institution of such investigation Emma Shannon sold all her interest in such business to Richard Shannon, her son, who now still continues to do business under the above described firm name. That J. T. Wilcox, doing business as Wilcox Brokerage Company, was originally a party to this matter in the investigation of operations before the Interstate Commerce Commission; however, the order of the Interstate Commerce Commission dismissed him from such cause.

## 2.

The Interstate Commerce Commission is a Commission created and established by Section 11 of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 11) as amended and having the jurisdiction and authority conferred by the terms of said Act.

## 3.

Plaintiff brings this action against the United States of America pursuant to the United States Code, Title 28, Sections 1336, 1398, 2284, and 2321-2325 to enjoin, set aside and annul a certain report and order entered by the Interstate Commerce Commission on April 5, 1960, but not delivered to plaintiff until the week of April 18, 1960, such order setting the compliance date as May 23, 1960, and being entered in the above numbered and described cause; i.e., MC-C-2055 before such Interstate Commerce Commission, and for further relief as hereinafter prayed.

[fol. 3]

4.

That on March 29, 1957, a hearing was held in the above numbered matter before R. J. Mittelbronn, Hearing Examiner, in which a full stenographic report was made, and on August 29, 1957, said examiner served his recommended report and order upon the parties, same being hereto attached and marked Exhibit "A" and made a part hereof as fully as though set forth at length herein, such report and order recommending that the action against plaintiff be dismissed. That almost two years later, to wit, August 3, 1959, Division 1 of the Interstate Commerce Commission decided this matter, and served copies of such report and order on plaintiff on August 11, 1959, same being hereto attached and marked Exhibit "B" and made a part hereof as fully as though set forth at length herein, such report and order requiring plaintiff to cease and desist from all operations in interstate or foreign commerce of the character found in said division report to be unlawful, unless and until appropriate authority therefor is obtained. That such report and order failing to follow the recommended report and order (Exhibit "A") was made only after the Interstate Commerce Act was amended, as described in said Exhibit "B", but plaintiff contends that such amendment of such Act should not affect plaintiff and that the recommended report above described as Exhibit "A" should have been adopted by said division of such Interstate Commerce Commission. That plaintiff filed in due time a petition for reconsideration before the Interstate Commerce Commission as a whole; however, as described above in paragraph 3, said Interstate Commerce Commission on April 5, 1960, issued a summary order without opinion stating that the findings of Division 1 were in accordance with the evidence and the applicable law and ordering the order of August 3, 1959, above described, as [fol. 4] indefinitely postponed with respect to statutory effective and compliance date be reinstated and the statutory effective and compliance date was thereby fixed as May 23, 1960, such order being marked Exhibit "C" and made a part hereof as fully as though set forth at length herein.

That the aforesaid order and report above described as Exhibit "C" as supported by the report thereof in Exhibit "B" are unlawful and void in the following respects:

1. There was no evidence upon which the Interstate Commerce Commission could make its final report and order and more particularly, but not limited to the key finding in such report that plaintiff has been and are engaging in transportation, in interstate commerce of sugar from Supreme, La. to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206 (a) or 209 (a) of the Interstate Commerce Act.

2. That the key finding in such report that plaintiff has been and are engaging in transportation, in interstate commerce of sugar from Supreme, La. to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206 (a) or 209 (a) is

- a. insufficient in fact or evidence
- b. not supported by fact or evidence
- c. insufficient in fact or evidence to the extent that the action by the Interstate Commerce Commission in finding otherwise was either illegal or arbitrary or capricious or a combination of same.

3. The Interstate Commerce Commission by its order above referred to as Exhibits "B" and "C" exceeded its authority and acted arbitrarily, illegally and/or capriciously.

4. That in view of the evidence in this matter, as a matter of law plaintiff should be declared to be engaged in [fol. 5] private carriage in respect to its transactions in sugar so that the above described order and report of the Interstate Commerce Commission should be set aside and enjoined.

5. That if the amendment of the Interstate Commerce Act in August, 1958, (after the taking of evidence in this cause) as set out on page 11, Exhibit "B", which amend-

ment amended section 203 (c) of such Act, had the effect of changing the legal effect of the operations of plaintiff under such Act, that plaintiff in carrying on such operations legally and properly prior to the amendment of such Act should be permitted to continue to do so inasmuch as plaintiff was lawfully engaged in same long prior to such amendment and to permit the amendment of such Act to make plaintiff's actions illegal under the facts of this matter would be arbitrary and/or capricious.

6. That the Interstate Commerce Commission acted arbitrarily, capriciously, and/or illegally in finding that under the facts and evidence before it, that under the "primary business" doctrine the transportation in question by plaintiff did not constitute private carriage.

7. That there is insufficient evidence in the record to show some rational basis for the administrative conclusions reached by the Interstate Commerce Commission in making the report and order above described as Exhibits "B" and "C".

#### 6.

That the undisputed evidence has shown in this cause that plaintiff is in the business of buying and selling sugar as well as livestock, corn, oats, wheat, bran, molasses, fertilizer, and salt and has been for some time. That the Interstate Commerce Commission does not contest the private carriage of any of the items except sugar and to find that plaintiff's operations in sugar is not private carriage is [fol. 6] arbitrary or capricious and contrary to the undisputed facts and law in view of the fact that plaintiff buys the sugar, is responsible for same, transports same in his own trucks, which trucks are only a part of the total assets of the company, sells the sugar on credit, and keeps a reasonable inventory of sugar on hand.

#### 7.

Plaintiff demands that defendant, Interstate Commerce Commission produce the following originals of such instruments in their possession; otherwise plaintiff will request permission to introduce secondary evidence thereof:

1. Stenographers' Minutes in Docket No. MC-C-2055 before the Interstate Commerce Commission being in the Matter of *Emma Shannon and Richard J. Shannon*, DBA *E. and R. Shannon* and *J. T. Wilcox*, DBA *Wilcox Brokerage Company—Investigation of Operations*, at San Antonio, Texas, March 29, 1957.
2. Report and Order recommended by R. J. Mittelbronn, Hearing Examiner, served August 29, 1957, in such cause.
3. Report of the Commission, Division 1, in such cause dated August 3, 1959, and served August 11, 1959.
4. Final Order of the Interstate Commerce Commission in such cause dated April 5, 1960, effective May 23, 1960.
5. Brief of Respondents due date May 29, 1957.
6. Respondents' Reply to Exceptions of Bureau of Inquiry and Compliance to Examiner's Recommended Report and Order due date November 8, 1957.
7. Petition of Emma Shannon and Richard J. Shannon dba E. and R. Shannon for Reconsideration due date September 10, 1959.

## 8.

Plaintiff would further unto the Court that immediate and irreparable injury loss and damage would result to plaintiff unless a temporary restraining order or stay order be issued ex parte and without notice against said defendants as provided for in United States Code, Title 28, Section 2324, restraining the Interstate Commerce Commission and the United States of America pending the final hearing and determination of this action from enforcing the terms of said order of April 5, 1960, hereinabove described as Exhibit "C", in that plaintiff has been actively engaged [fol. 7] in the sugar business for approximately six years and has established customers who purchase such sugar from plaintiff and for plaintiff to cease and desist from purchasing same from Supreme, La., plaintiff's chief source of sugar for transportation to San Antonio, Texas, for



sale for any period of time would cause plaintiff's inventory of sugar and sources of sugar to be seriously depleted and would cause plaintiff's customers to go elsewhere for their sugar and thereby cause plaintiff to lose all or a substantial portion of their customers, thereby greatly damaging plaintiff and causing plaintiff immediate and irreparable injury.

Wherefore, plaintiff prays that a three-judge court be convened, pursuant to United States Code, Title 28, Sections 2284 and 2325, upon the filing of this complaint; that plaintiff be granted an interlocutory injunction or stay order as provided in United States Code, Title 28, Section 2324, restraining the United States of America and the Interstate Commerce Commission from enforcing the terms of said order of April 5, 1960, and above described as Exhibit "C", which required and requires respondents (plaintiff herein) to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce of the character found in the said division report (Exhibit "B") to be unlawful, unless and until appropriate authority therefor is obtained; and that upon the final hearing of this cause, a decree be entered adjudging the said order to be in all respects null and void and permanently enjoining, annulling and setting aside the enforcement, operation and execution of said order; and for such further and other relief in the premises as to this court shall seem proper.

Wolff & Wolff, By Walter C. Wolff, Jr., Attorneys  
for Plaintiff, James K. Building, 417 S. Main Avenue,  
San Antonio, Texas;

[fol. 8] E. and R. Shannon, By Richard J. Shannon.

*Duly sworn to by Richard J. Shannon, jurat omitted in printing.*

[fol. 9]

## FIAT

Upon the verified complaint heretofore filed herein and upon motion by plaintiff for an interlocutory injunction and for a temporary restraining order without notice against the defendants, it appearing to this court that the complaint seeks a judgment restraining the United States of America and the Interstate Commerce Commission from enforcing the terms of said order of April 5, 1960, which required and requires plaintiff herein to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain jointly and severally, from all operations in interstate or foreign commerce of the character found in the said division report (Exhibit "B") to be unlawful, unless and until appropriate authority therefor is obtained, this court finds that immediate and irreparable damage will be caused to said plaintiff unless a temporary restraining order is issued ex parte and without notice against said defendants, in that from the evidence in such verified petition before the court it appears that plaintiff has been actively engaged in the sugar business for approximately six years and has established customers who purchase such sugar from plaintiff and for plaintiff to cease and desist from purchasing same from Supreme, La., plaintiff's chief source of sugar for transportation to San Antonio, Texas, for sale, for the period of time necessary to notify defendants and have a hearing thereon would irreparably damage plaintiff in that plaintiff's inventory of sugar and sources of sugar would be seriously depleted causing plaintiff's customers to purchase their sugar elsewhere,

Now, Therefore, It Is Ordered, Adjudged and Decreed that said United States of America and the Interstate Commerce Commission be enjoined from enforcing the terms of their order of April 5, 1960, which required and [fol. 10] requires plaintiff herein Emma Shannon and Richard J. Shannon, d/b/a E. and R. Shannon, cease and desist on or before May 23, 1960, and thereafter to refrain and abstain jointly and severally, from all operations in interstate or foreign commerce of the character found in the said division report of Division 1 of the Interstate Commerce Commission (Exhibit "B" herein) to be unlawful,

unless and until appropriate authority therefor is obtained until the final hearing and determination of this action by the full court of three judges.

This temporary restraint is on condition that a bond be filed by the plaintiff herein in the sum of ..... Dollars conditioned that plaintiff will pay all costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Issued at San Antonio, Texas, at ..... o'clock, .....M. this ..... day of May, 1960.

....., District Judge.

[Vol. 11]

#### EXHIBIT A TO COMPLAINT

### INTERSTATE COMMERCE COMMISSION

Served Aug 29 1957

#### NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-C-2055

EMMA SHANNON AND RICHARD J. SHANNON, dba  
E. AND R. SHANNON AND J. T. WILCOX, dba  
WILCOX BROKERAGE COMPANY INVESTIGA-  
TION OF OPERATIONS

Decided: 0

1. Investigation of J. T. Wilcox, doing business as Wilcox Brokerage Company dismissed.
2. Operations of E. and R. Shannon found not shown to be those of a common or contract carrier by motor vehicle subject to part II of the Interstate Commerce Act. Investigations discontinued.

*Walter C. Wolff*, for respondents.

*William W. Guild*, for Bureau of Inquiry and Compliance,  
Interstate Commerce Commission.

REPORT AND ORDER

RECOMMENDED BY R. J. MITTELBRONN,  
HEARING EXAMINER

By order dated November 5, 1956, the Commission, division 1, instituted this investigation under section 204(c) of the Interstate Commerce Act for the purpose of determining (1) whether Emma Shannon and Richard S. Shannon, doing business as E. and R. Shannon, have been and are engaging in the transportation of property as a common or contract carrier by motor vehicle in violation of section 206(a)(1) or 209 (a)(1) of the act, and (2) whether J. T. Wilcox has been and is engaging in transactions as a broker in violation of section 211 of the act. By subsequent order dated February 12, 1957, the Commission referred these matters to joint board No. 32 for hearing scheduled March 29, 1957. Said board having waived action thereon [fol. 12] by failure of its members to appear and participate in the assigned hearing, this report and accompanying

recommended order have been prepared by the examiner who conducted the hearing pursuant to said order of February 12, 1957.

During the course of the hearing no evidence was presented with respect to the implied unauthorized brokerage of transportation by respondent J. T. Wilcox. This phase of the investigation should therefore be dismissed. The facts pertaining to the nature of respondent E. and R. Shannon's business interests are not in dispute; it is only the significance to be attributed thereto that gives rise to the controversy herein. Said undisputed facts can be summarized thus: E. and R. Shannon is a partnership which has been and still is engaged in the business of buying and selling livestock since 1934 (R-73).<sup>1</sup> The investigator for the Commission's Bureau of Inquiry and Compliance is satisfied in his own mind that the general and primary business of this partnership is that of a livestock dealer and shipper as well as livestock feedstuffs dealer (R-27). Respondent was certified years ago by the Interstate Commerce Commission as a private carrier of livestock and is so registered at this time (R-28). About 1951 respondent's activities were expanded to include dealer handling of grain, fertilizer, molasses and salt; about three years ago respondent started in the purchasing and selling of sugar (R-74). The total fixed assets of respondent as of December 31, 1956 are:

Automobiles (3) .....	\$ 4,597.01
Trucks (7) .....	14,176.50
Furniture & Fixtures .....	926.70
Total Mill Equipment (for grinding feeds etc.) .....	10,851.06
Building (principally storage) .....	26,944.49
Cottage <sup>2</sup> .....	1,854.50
<b>Total</b> .....	<b>\$59,450.26</b>

<sup>1</sup> This has reference to the page number in the transcript of record.

<sup>2</sup> Cottage accepted in payment of bad debt.



As a dealer in livestock and feedstuffs respondent alternately employs one of three of its trucks to transport said commodities from San Antonio, Tex., to customers in or in the vicinity of Supreme, La. As a dealer in sugar, respondent purchases quantities of said commodity from a refinery by name of J. Aaron & Co., located in Supreme, La., the sugar is transported in respondent's vehicles returning to San Antonio, and there sold and distributed to local customers. The sales by J. Aaron & Co., to respondent are effected through J. T. Wilcox, broker in San Antonio, who receives a commission thereon from the refinery. All such sales are on credit with the usual 2 percent discount-10 days payment provision being honored; the sales by respondent to local customers are on the same basis. Based on the going market, the normal return to a sugar dealer in San Antonio averages anywhere from 25 cents to 35 cents per 100 pounds (R-69). While respondent has never employed regulated carriers to transport its movements of sugar from Louisiana to Texas it has and still does employ rail service to move some inbound and outbound carload movements of livestock, grains and other articles (R-86/87). Respondent admits it could not send empty trucks up to [fol. 13] Supreme, La., to haul sugar back and still make a profit on the sale of the sugar at current market prices in San Antonio (R-82). Prior to respondents dealings in sugar it back hauled salt and grain from Louisiana. (R-83).

Based on the foregoing described operations or respondent counsel for the Bureau of Inquiry adopts the position that respondent's transportation of sugar in its private trucks is not incidental to and in furtherance of its enterprise of selling sugar, but is for the purpose of profiting from the interstate transportation itself, which fact takes respondent out of the category of a private carrier as defined by section 203 of the act, citing, *Brooks Transportation Company, Inc. v. United States*, 93 F. Supp. 517, affirmed 340 U. S. 925, and other authorities. Heavy emphasis is placed on the following matters of record by Bureau Counsel to support its position: (1) The investigation by the local I.C.C. supervisor of respondent's record disclosed that the latter does not customarily store its

sugar, but has it delivered direct to purchasers; it is then argued that the purchase and transportation of sugar in the fulfillment of preexisting orders are indicia of a motor carrier operation. (2) Respondent's admitted inability to profitably engage in the sugar enterprise except by transportation of the commodity as a back-haul in its own vehicles is inconsistent with respondent's claimed status as a private carrier. (3) With total fixed assets of \$59,350.26, respondent only employs the back-haul use of three trucks and the services of its drivers to conduct the activities in the sugar business; the total respondent weekly payroll is \$1,100 which about \$240 is paid these three drivers. From this Bureau Counsel argues that the record does not support a conclusion that respondent's facilities and payroll, insofar as they are directed to the sugar business, are presently expended on nontransportation functions. As a corollary, it is further argued that respondents activities in sugar dealing are possible solely through the use of its transportation facilities and personnel. This argument is buttressed with a showing that respondent's purchase, transportation and sale of sugar results in an average profit of 35 cents per 100 pounds, which is compared with the existing carload rail rate of 69 cents and the truckload common carrier rate of 109 cents from Supreme to San Antonio. (Exhibits Nos. 1, 2, and 3). From these facts Bureau Counsel concludes that if any type of common carriage were employed to haul the sugar, respondent's losses would be insurmountable; that the profit which is realized results only from the interstate transportation in its own trucks. Insofar as respondent's dealings in the sugar business are concerned, it is alleged that under the "primary business doctrine" enunciated by the Commission (Refer list of authorities, Bureau Counsel's Brief, page 8) respondent cannot be found to be a "private carrier" as defined in section 203 of the act.

A complete analysis of the definitions of "Common Carrier" "contract carrier" and "private carrier" as contained in section 203 of the act and the characteristics which distinguish private carriage from "for-hire" carriage, has been made by the Commission in *Woitishek Common Carrier*

*Application 42 M.C.C. 193* and need not be repeated here. Sufficient it is to observe that in said decision the Commission [fol. 14] concluded "We are convinced that we should continue as in the past to determine all issues of for-hire versus private carriage on the basis of the operator's primary business. In so doing, we shall, of course, give appropriate consideration to the fact, when shown, that an operator receives compensation for transportation performed identifiable as such, but we do not think that such fact alone should be allowed to control our decision. Neither does it follow that an operator having a bona fide business other than transportation may not also be carrier for-hire if it appears that any transportation which he performs is not primarily in furtherance of his noncarrier interest but rather is performed with a purpose to profit from the transportation as such. In short, each case must be determined upon its own particular facts, and neither the receipt of compensation for transportation identifiable as such nor the existing of some noncarrier business to which the transportation may be incidental is *alone* conclusive."

On the record as made the following facts appear to be significant: Respondent has been in business since 1934, almost 23 years, and in this protracted period it has not engaged in any important truck operations. Respondent has a storage facility at one point, San Antonio, in which it maintains a small inventory of sugar, and which is predominantly utilized for other commodities. While customarily respondent's transportation of sugar may be direct from origin to local customers, many small sales, i.e., from one to twenty-five bags, are made out of the warehouse inventory. Of respondent's total fixed assets approximating \$59,000 only the partial use of three trucks and driver services plus a indefinable percentage of warehouse facilities are employed to conduct its sugar dealings. There is no identifiable transportation charges made by respondent to the purchasers of the sugar. Respondent has no basis or formula for assessing transportation charges; its sales are governed solely by the market price of sugar in San Antonio. His margin of profit of 35 cents per 100 pounds over the total costs of his sugar business, including

transportation, is only about 5 percent above the sales price of J. Aaron & Co., refinery. All of respondent's sales are to customers in the State of Texas, the greatest majority being right in San Antonio. Respondent does not hold himself out to the general public to haul sugar for any compensation; nor is it conclusively shown that it transports sugar for compensation to specifically fill individual orders or under individual contracts or even verbal agreements.

The examiner finds that respondent is engaged in a bona fide business of buying and selling livestock, livestock feed-stuffs, molasses, grain, salt and sugar; that transportation in its own vehicles of the sugar to which it holds title and its sale thereof is in the furtherance of its commercial dealership enterprise in San Antonio. All of respondent's purchases of sugar are made f.o.b. refinery, the unidentifiable cost of transporting sugar to Texas in its own equipment is borne by respondent. Under the "primary business doctrine" test, discussed *supra*, such transportation of sugar is private carriage.

[fol. 15] The examiner recommends that the attached order embracing the foregoing findings and discontinuing the proceeding be entered.

By R. J. Mittelbronn, Hearing Examiner.

(Signature) R. J. MITTELBRONN

[fol. 16]

Recommended by R. J. Mittelbronn,  
Hearing Examiner.

(Signature) R. J. MITTELBRONN

### ORDER

At a Session of the INTERSTATE COMMERCE COM-  
MISSION, Division 1, held at its office in Washington,  
D. C., on the            day of            A. D. 1957.

No. MC-C-2055

EMMA SHANNON AND RICHARD J. SHANNON, dba  
E. AND R. SHANNON AND J. T. WILCOX, dba  
WILCOX BROKERAGE COMPANY INVESTIGA-  
TION OF OPERATIONS

*It appearing,* That the Commission, division 1, by order  
of November 5, 1956, entered upon an investigation into  
certain alleged unlawful operations of the above-named  
respondents.

*It further appearing,* That full investigation of the mat-  
ters and things involved has been made, that the said  
proceeding upon due notice has been heard by the exam-  
iner, who has made and filed a report containing his findings  
of fact and conclusions thereon, which report is hereby  
referred to and made a part hereof, and said proceeding  
having been duly submitted:

*It is ordered,* That the proceeding insofar as it pertains  
to the investigation of operations of J. T. Wilcox, dba  
Wilcox Brokerage Company, be, and is, hereby dismissed.

*It is further ordered,* That the investigation of other  
named respondents be discontinued.

By the Commission, division 1.

HAROLD D. MCCOY,  
Secretary.

(SEAL)



[fol. 17]

**EXHIBIT B TO COMPLAINT**

Date of service August 11, 1959

**INTERSTATE COMMERCE COMMISSION**No. MC-C-1994<sup>1</sup>**FRAERING BROKERAGE COMPANY, INC.,  
INVESTIGATION OF OPERATIONS***Decided August 3, 1959*

1. Operations by respondent, in No. MC-C-1994, in the transportation of sugar from Matthews, La., to Harlingen, Tex., found to be those of a carrier for hire for which authority is required. Order entered requiring respondent to cease and desist from such unauthorized operations.
2. Operations by respondents Emma Shannon and Richard J. Shannon, in No. MC-C-2055, in the transportation of sugar from Supreme, La., to points in Texas found to be those of a carrier for hire for which authority is required. Order entered requiring respondents, jointly and severally, to cease and desist from such unauthorized operations.
3. Respondent J. T. Wilcox found not shown to have engaged in transportation as a broker of transportation in violation of section 211 of the act. Order entered discontinuing proceeding No. MC-C-2055 as to this respondent.

<sup>1</sup> This report also embraces No. MC-C-2055, Emma Shannon et al., Investigation of Operations.

*Robert A. Ainsworth, Jr.*, for respondent in the title proceeding.

*Walter C. Wolff, Sr.*, and *Walter C. Wolff, Jr.*, for respondents in the subtitled proceeding.

*Ellis V. Gregory, Bernard H. English*, and *William W. Guild* for the Bureau of Inquiry and Compliance, Interstate Commerce Commission.

#### REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND WEBB

By DIVISION 1:

These proceedings were heard on separate records and were the subject of separate examiner reports and recommended orders. Since related issues are involved, they will be disposed of here in a single report.

Exceptions were filed by respondent in the title proceeding to the order recommended by the examiner, and the Bureau of Inquiry and Compliance of this Commission, hereinafter called the Bureau, replied. In the subtitled proceeding, the Bureau filed exceptions to the order recommended by the examiner, and respondents replied. Our conclusions differ somewhat from those recommended.

In No. MC-C-1994 by order entered June 21, 1956, division 1, instituted an investigation under section 204(c) of [fol. 18] the Interstate Commerce Act, to determine whether Fraering Brokerage Company, Inc., hereinafter called Fraering, of New Orleans, La., has been or is engaging in the transportation of property, in interstate or foreign commerce, for compensation, as either a common or contract carrier by motor vehicle in violation of section 206(a) (1) or 209(a)(1) of the act. After hearing, the examiner found that Fraering's transportation of sugar from Matthews, La., to points in Florida, Mississippi, and Texas is that of a for-hire carrier by motor vehicle subject to part II of the act, and recommended that it be ordered to cease and desist from such operations.

On exceptions Fraering contends that the examiner erred (1) in finding that it was interested solely in the revenue

earned by its trucks transporting sugar in order to obtain a return movement of canned goods, (2) in finding that its principal consideration in transporting sugar sold is the revenue received from the transportation thereof, and (3) in finding that transportation of sugar by it did not appear to be in furtherance of its selling operations. It asserts that under the "primary-business" test, hereinafter described, its transportation of sugar should be found to be incidental to and part of its brokerage operations and therefore private carriage. In reply to Bureau contends (1) that such transportation is not incidental to or in furtherance of Fraering's nontransportation business, (2) that, conceding that Fraering has a bona fide business as a broker of sugar, the existence of such a business does not of itself preclude a finding that the transportation of the concerned sugar is for-hire transportation, and (3) that its principal consideration in transporting the sugar is compensation earned by such transportation.

In No. MC-C-2055, division 1 instituted an investigation, by order dated November 5, 1956, under section 204(c) of the act, for the purpose of determining (1) whether Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, of San Antonio, Tex., hereinafter called the Shannons, have been and are engaged in the transportation of property as a common or contract carrier by motor vehicle in violation of section 206(a)(1) or 209(a)(1) of the act, and (2) whether J. T. Wilcox has been and is engaged in transactions as a broker in violation of section 211 of the act.

After hearing, the examiner found that the Shannons are engaged in the business of buying and selling livestock, livestock feedstuffs, molasses, grain, salt, and sugar; that the transportation in their own vehicles of the sugar to which they hold title is in the furtherance of their primary noncarrier commercial enterprise; that under the "primary business" doctrine such transportation constitutes private carriage; and that the investigation should be discontinued. No evidence was presented at the hearing tending to show [fol. 19] any unauthorized brokerage operations by respondent J. T. Wilcox, and the proceeding as to this respondent will be discontinued.

On exceptions the Bureau maintains (1) that the examiner erred in finding that the Shannons' transportation of sugar is in furtherance of a primary commercial enterprise other than transportation and hence private carriage, (2) that they transport sugar, not as a private carrier, but with the purpose of profiting from the transportation in the same manner as any for-hire carrier does, (3) that the purchase and sale of sugar is merely a device to procure a payload for vehicles which would otherwise return empty, (4) that the small storage of sugar at San Antonio, the direct deliveries to ultimate users, and the small profit (less than prevailing transportation costs) netted by respondents are all indicia of for-hire carriage, (5) that the close proximity of the dates of purchase to the dates of delivery to such users strongly indicates purchases by respondents to fill orders previously secured despite contrary claims, and (6) that taken together the foregoing facts require a finding that the Shannons are engaged in the interstate transportation of sugar as either a common or contract carrier by motor vehicle without appropriate authority from this Commission. In reply the Shannons assert that their primary business is that of buying and selling livestock, grain feed, sugar, and other commodities; that their transportation of sugar is in furtherance of their noncarrier commercial activities and a necessary incident thereto; and that the findings of the examiner should be adopted.

The recommendations of the examiners, the exceptions, and the replies thereto have been considered in the light of the evidence. We find the statements of facts in the examiners' reports to be adequate in all material respects, and, as modified here, we adopt them as our own. Certain facts will be repeated herein for clarity of discussion.

No. MC-C-1994.—Fraering, operating a warehouse at New Orleans, engages in wholesale selling of canned foods, dried fruits, nonfood items, and certain specialty items, hereinafter collectively called groceries. In addition to wholesaling its own groceries, it sells some other grocery items as a broker, and acts as a broker of refined sugar produced by the South Coast Corporation of New Orleans, hereinafter called South Coast. Fraering's transportation

of its own groceries admittedly is conducted as part or as an incident of its primary business, the sale and brokerage of certain products and, as such, its operations relating to these commodities are those of a private carrier. Fraering transports only a relatively small portion of brokered groceries compared to its own commodities and, to a great extent, only as an accommodation to those with whom it [fol. 20] deals. Since the charge per case for this transportation of brokered groceries does not vary with distance traveled, only some of this transportation is profitable. The transportation of brokered groceries does not appreciably affect Fraering's cost of operation. This described transportation of brokered goods other than sugar is private carriage in bona fide furtherance of Fraering's wholesale and brokerage business. The transportation by Fraering in its own vehicles of its own groceries and of the grocery items it brokers is not challenged. It is Fraering's activities with respect to the transportation of sugar which concern us here.

Within a defined area of the South and Southwest, Fraering is the exclusive selling agent for sugar produced by South Coast at Matthews, La., some 40 or 50 miles from New Orleans. Of the 8 million pounds of sugar sold by Fraering for South Coast, between September 1955 and January 1956, all but 810,000 pounds moved by for-hire carriers from Matthews directly to the various consignees. The remaining 810,000 pounds were handled by Fraering in its own tractor-trailer units of which it has four. These four units of equipment also were utilized to move groceries. Fraering's representative indicates (1) that Fraering only transports a load of sugar when it can be moved in conjunction with a grocery movement in the opposite direction; (2) that it has more groceries moving toward New Orleans from points in the Rio Grande Valley of Texas than sugar shipments in the other direction, and only utilizes rail carriers for the sugar movements when it is impossible to correlate an inbound grocery shipment with an outbound sugar shipment; (3) that, generally, the charge made for sugar transportation would little more than cover the cost of operation, and in some instances the charge for the transportation plus brokerage fees does not entirely cover the



cost of operation of the trucks while loaded with a particular sugar shipment; (4) that, even though there are other benefits in using private carriage rather than for-hire carriage, the principal incentive for Fraering's transportation of sugar is that the sugar constitutes return lading for trucks moving its groceries in the opposite direction; and (5) that the revenue received is adequate to assure overall profitable operations inasmuch as the cost of transportation on the commodities moving in the opposite direction is sharply reduced by the sugar backhaul.

Fraering takes possession of the sugar at Matthews and assumes responsibility for it while it is in transit but does not take title to it. South Coast is paid by the consignee for the sugar f.o.b. Matthews, and any transportation charge for carriage performed by Fraering, whether collected directly by it or collected by South Coast, belongs to Fraering. In the sale of sugar as a broker, Fraering enters into [fol. 21] contracts with buyers on contract forms of South Coast or sells sugar on spot quotations from the refinery. It receives a brokerage fee which is unrelated to whether the sugar moves by for-hire carriage or by private carriage.

One of the principal purchasers of sugar produced by South Coast is located at Harlingen, in the Rio Grande Valley of Texas. Most of the sugar sold by Fraering to this buyer is transported by Fraering from the refinery to Harlingen. Fraering regularly purchases substantial quantities of groceries from a source of supply at Donna, Tex., about 23 miles west of Harlingen, and sometimes moves such commodities to New Orleans in conjunction with sugar hauls to Harlingen. On the movement of sugar from Matthews to Harlingen, Fraering collects 53.59 cents per 100 pounds over and above the cost of the sugar at point of origin; this compares with transportation charges of 73 cents per 100 pounds by rail in earloads and \$1.10 per 100 pounds, in truckload quantities by use of regulated for-hire motor carriers. There is some indication of record that Fraering provides the over-the-road transportation from the refinery to other sugar customers including military installations at points other than Harlingen, but its method of operation with respect to such customers and the relationship of such operations to its primary business is not

sufficiently developed in this record to further merit our consideration.

No. MC-C-2055.—The facts pertaining to the business activities and transportation engaged in by the Shannons are as follows: E. and R. Shannon, with headquarters and a warehouse at San Antonio, have been engaged as a partnership in the business of buying and selling livestock since 1934, and in connection therewith have transported livestock as a bona fide private carrier. In or about 1951 their activities were expanded to include the purchase and resale of grain, fertilizer, molasses, and salt, and in 1954, of sugar. They operate seven trucks which are used in connection with some deliveries to customers of the commodities in which they deal. On shipments of livestock and some other commodities (not including sugar) they use common carriers to some extent but have never used for-hire carriage for the transportation of sugar. No one questions but that the primary business of the Shannons is that of a dealer in livestock and related items above named except sugar, and that the transportation by them of all of the named commodities, except sugar, is primarily in furtherance of their main or principal business. In dealings which correspond with movements of livestock transported to destinations in southern Louisiana, the Shannons have been purchasing sugar, in 100-pound bags, from a refinery at Supreme, La., and transporting and selling it to purchasers, the majority [fol. 22] of whom are located in San Antonio. The distance from Supreme to San Antonio is 525 miles. All purchases from the refinery are made on credit, subject to a 2-percent discount if payment is made within 10 days, and the sales by the Shannons at San Antonio are made on the same terms.

An investigation by the Commission's district supervisor indicates that the sugar transported by the Shannons is customarily loaded at the refinery, moved directly to and unloaded at the place of business of the purchaser, although sometimes loads are delivered to the Shannons' warehouse at San Antonio and subsequently sold to users in small lots of from 1 to 25 bags. At the hearing the dominant partner maintained that the sugar transported is never

sold until after it has left Supreme and is en route to San Antonio; but there are some contrary indications of record, and it is clear that whenever sugar transportation is not coordinated with an appropriate backhaul, it is transported to fill an order obtained in advance. On one occasion the Shannons were forced to use a public warehouse for a truckload of sugar because of space limitations of their own warehouse and, generally, the record supports a finding that sugar sales usually are made by the Shannons after it is en route or has arrived at their warehouse.

Based on the going market price, a bona fide dealer at San Antonio will normally realize a profit of from 25 to 35 cents per hundred pounds on sugar. The Bureau submitted an exhibit covering 15 truckloads of sugar transported by the Shannons from Supreme to San Antonio during the period from May to August 1956, on which the net profit to them, based upon the difference between the price paid at Supreme and that received at San Antonio, including transportation, ranged from 27 to 47 cents a hundred pounds, and averaged 35.74 cents per hundred pounds. The Bureau argues that the profits realized by the Shannons from their sugar sales and those realized by bona fide sugar dealers at San Antonio are not directly comparable because the former are computed without regard to transportation costs whereas the latter necessarily allow for such costs. Compared to the Shannons' average profit of 35.74 cents per hundred including transportation, the record indicates that the applicable rail carload and motor truckload rates on sugar moving from and to the same point is 69 and 109 cents per hundred pounds, respectively. The 15 truckloads listed by the Bureau were resold in San Antonio within from 1 to 2 days after their pickup at Supreme. The Shannons' explanation of the rapid turnover is that sugar is highly perishable, being particularly susceptible to damage by dampness; that it is subject to sudden and drastic price fluctuations; and that consequently all dealers make a practice of selling it as quickly as possible in order to forestall any loss. They frankly admit, however, that the principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements

of livestock and other commodities from San Antonio and that in order to make a profit on the sugar haul they have to have traffic moving from San Antonio to Louisiana.

#### DISCUSSIONS AND CONCLUSIONS

In *Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. 65, 75, hereinafter called the *Lenoir* case, it was said that, if the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. This decision was affirmed by the Supreme Court of the United States in *Brooks Transp. Co., Inc., v. United States*, 340 U. S. 925.

Subsequent to the taking of evidence in the instant proceedings, section 203(c) of the act was amended (in August 1958) to read:

Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Amendment of this section had the effect, among other things, of writing into the act our usual or "primary business" test by which we determine whether questioned transportation activities of those also engaged in business enterprises other than transportation are within the scope of lawful private carriage or of motor-carrier operations for compensation for which authority from this Commission is

required. From the portion of the legislative committee reports relating to the amendment of section 203(c) set forth in appendixes A and B hereto it is clear that insofar as the test expressed in the *Lenoir* case is concerned, the amended section is not intended to change, but to codify, the law with respect to the test for the determining of what transportation activities are permitted within the scope of lawful private carriage. It is our view that the principal question here, whether considered prior to or subsequent to the amendment of section 203(c), inasmuch as neither [fol. 24] Fraering nor the Shannons are engaged in transportation as a primary business, is whether the sugar transportation operations of Fraering or of the Shannons are in bona fide furtherance of the primary business of the respective respondents, on the one hand, or, on the other, are conducted as related or secondary enterprises with the purpose of profiting from the sugar transportation performed.

In each of the proceedings before us, the respondents are primarily engaged in certain noncarrier commercial enterprises. The respondents concededly are performing some transportation as private carriage within the scope, and in furtherance, of their respective primary business enterprises. In order to determine the status of their sugar transportation activities, we must consider both their primary business and the particular facts relating to each of the transportation operations performed.

Fraering is primarily a wholesaler and broker of certain grocery items but contends that its primary business includes the brokerage of sugar. Its transportation activities include the carriage of such commodities as canned foods, dried fruits, nonfood items, and certain specialty items. They also include the carriage of sugar. We are concerned here with how its sugar brokerage differs, if at all, from its wholesale and other brokerage business enterprise and how its sugar transportation activities differ, if at all, from its transportation activities which are concededly in furtherance of its primary business. The Shannons are engaged in buying and selling livestock and certain related items including, according to their contention, sugar. Similarly, we are concerned here with how their sugar dealings



differ, if at all, from their dealings in the other commodities and how their sugar transportation activities which are admittedly in furtherance of their primary business.

Fraering wholesales certain commodities for profit and, in fact, derives from its wholesaling enterprises most of its business profit. Its brokerage of certain grocery items does not change its basic wholesaling operation but, rather, adds to its line a few complementary items which are handled in a manner similar to those it sells as a wholesaler and does not change its profit sources or expectations. The handling of these items as a wholesaler or broker is its primary business from which it expects, without relying on profit which is expected to accrue from transportation activities, to make a profit. Its dealings in sugar, which it sells as a broker but does not transport and on which it merely profits as a broker, appears to be an enterprise similar to, or even a part of, its primary business. However, its dealings in some sugar, as in the situation where it buys at Matthews and sells at Harlingen, wherein the principal reason, clearly expressed in the record in the title proceeding, for such deal-[fol. 25] ings is the generation of sugar shipments which it can transport as return lading for its trucks which are moving in the opposite direction, cannot be considered to be a part or within the scope of its primary business. That its activities with respect to this described sugar which it transports have a purpose different from the purposes of its primary business can be more clearly seen when it is considered that such sugar transportation is not believed by it to be undesirable or without profit even when the transportation charge plus brokerage fees do not entirely cover the cost of operation of the truck transporting the particular sugar shipment. It is clear that the purpose of its engaging in the brokerage of such sugar and the transportation thereof from Matthews to Harlingen is to reduce the cost of transporting groceries (owned by it) from Donna to New Orleans. The "reduction of the cost of transportation" of the other commodities from Donna to New Orleans constitutes a profit from the transportation of sugar from Matthews to Harlingen, and we are satisfied that its operations with respect to the sugar which it transports from Matthews to Harlingen are undertaken "for the purpose of



profiting from the transportation as such." In the *Lenoir* case we said that a finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that motor operations are conducted in bona fide furtherance of its other and primary enterprise. We have that situation here. Inasmuch as Fraering's transportation of sugar from Matthews to Harlingen makes its grocery transportation in the opposite direction more profitable, to this extent, it is an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which the grocery transportation is performed. It can, however, at most, be considered to be in furtherance of certain lawful private transportation operations of Fraering, and only secondarily related to the primary business of Fraering, which is again, a noncarrier commercial enterprise. It is our opinion that, while its transportation of commodities other than sugar are in furtherance of its primary business, its transportation of the sugar, which it transports from Matthews to Harlingen, with respect to its primary business, is a related or secondary enterprise conducted with the purpose of profiting from the transportation performed and, as such, constitutes for-hire carriage for which operating authority from this Commission is required; and we so find.

The Shannons have long been buying and selling certain commodities and in connection therewith transporting them to purchasers, in bona fide furtherance of their primary business, as a dealer in those commodities. The Bureau [fol. 26] concedes that the transportation of livestock and certain related items is within the scope of lawful private carriage, but argues, in essence, that the here considered sugar transportation operation is undertaken to make profitable their lawful private-carrier activities in the opposite direction; is no more than a related or secondary enterprise, with respect to their primary business, inasmuch as it is conducted with the purposes of profiting from the transportation as such; and, as a consequence, is for-hire transportation subject to the licensing provisions of the act. There can be no question but that the considered sugar transportation and the transportation admittedly within the

scope of their lawful private carrier activities tend to support one another and that part of the profit of each is the reduction of the cost of the other. It also seems clear that, in many instances, for example at the time of the hearing, dealership in the sugar by the Shannons would not be conducted at a profit without the benefit of backhaul traffic. In fact, the Shannons admit that their principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio, and that in order to make a profit on the backhaul of sugar they would have to have something moving to Louisiana from San Antonio. Although there are vague representations of record that the Shannons have transported sugar from Supreme to some points in Texas on occasions when the shipments were not coordinated with backhauls of livestock or feeds, the dominant partner, in discussing such movements describes such a situation as one wherein they had an order, made a special trip to Supreme, and got "more" money for hauling the particular load of sugar handled under the arrangement. This situation in itself constitutes for-hire carriage within the doctrine of *Jay Cee Transport Co. Contract Carrier Application*, 68 M.C.C. 758, which holds, in part, that in a situation where a person actually does nothing but transport commodities from its suppliers to the users thereof, the fact that the person takes title to the goods is not sufficient to establish the person's status as a private carrier. The more usual arrangement under which they operate, however, appears to be one in which the Shannons have no preexisting sugar order, but buy with the intention of selling later either en route or after the transportation is accomplished. This procedure is ordinarily coordinated with a backhaul, and the purpose of their sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks which are moving in the opposite direction. We are satisfied that the purpose of their buying and selling sugar and the transportation thereof from Supreme to certain points in Texas is to reduce the cost of transporting other commodities outbound from San [fol. 27] Antonio. Such reduction of the cost of transportation of the other commodities constitutes a profit from

the transportation of sugar from Supreme to the Texas points, and we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such. Inasmuch as their transportation of sugar makes their transportation of other commodities in the opposite direction more profitable, to this extent, it is an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which their transportation of other commodities is performed. But it can, at most, be considered to be in furtherance of certain lawful private transportation operations of the Shannons, and only secondarily related to their primary business, which, again, is a noncarrier commercial enterprise. Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required; and we so find.

We find in No. MC-C-1994 that Fraering Brokerage Company, Inc., has been and is engaging in transportation, in interstate commerce, of sugar from Matthews, La., to Harlingen, Tex., for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of section 206(a) or 209(a) of the Interstate Commerce Act; and that an order should be entered requiring it to cease and desist from all such for-hire operations until appropriate authority is obtained from this Commission.

We find in No. MC-C-2055 that Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, have been and are engaging in transportation, in interstate commerce, of sugar from Supreme, Va., to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of section 206(a) or 209(a) of the Interstate Commerce Act; and that an order should be entered requiring them to cease and desist from all such for-hire operations until appropriate authority is obtained from this Commission.

And, we further find in No. MC-C-2055 that J. T. Wilcox has not been shown to have engaged in any transactions

as a broker of transportation in violation of section 211 of the act and that the proceeding should be discontinued as to respondent J. T. Wilcox.

Orders will be entered (1) requiring Fraering Brokerage Company, Inc., and Emma Shannon and Richard J. Shannon, in the respective proceedings, to cease and desist forth-[fol. 28] with, and hereafter to abstain, from participation in any operation, in interstate or foreign commerce, of the character found in this report to be unlawful, unless and until there is in force and effect, with respect to such carriage, appropriate authority therefor, and, (2) in the subtitle proceeding, discontinuing the proceeding as to respondent J. T. Wilcox.

COMMISSIONER WEBB, dissenting in part:

I am unable to concur in the finding in No. MC-C-1994 that the respondent, Fraering, is engaged in for-hire transportation of sugar. Fraering is a bona fide broker of sugar, and this report concedes that its sugar business appears to be a part of its primary business. In the circumstances, it is my opinion that the evidence warrants the conclusion that its transportation of sugar is in furtherance of its primary (nontransportation) business and is a true private carriage operation.

I agree with the findings in No. MC-C-2055. The evidence warrants the conclusion that respondents-Shannons, unlike Fraering, are not bona fide dealers in sugar despite their maintenance of a rather small sugar inventory at their San Antonio storage facility. They are properly found to be unlawfully engaged in for-hire transportation.

#### APPENDIX A TO EXHIBIT B TO COMPLAINT

*Portion of Senate Report No. 1647 of the Committee on Interstate and Foreign Commerce on S. 3778 relating to amendment of section 203(c) of the act*

#### 7. ECONOMIC REGULATION OF COMMERCIAL TRANSPORTATION

A matter of serious concern to the subcommittee is the growing practice of persons engaging in the commercial

transportation of property by motor vehicle under circumstances that do not constitute bona fide private carriage, as that term is properly understood, but that nonetheless enable them to evade the economic regulation to which common and contract carriers by motor vehicles are subject even though the transportation services performed are not specifically exempt from such regulation. Most frequently, perhaps, evasion of the economic regulation to which it is intended that all for-hire carrier transportation of property other than that specifically exempted shall be subject is accomplished under the guise of private carriage.

The enormous growth of commercial private carriage of property by motor vehicle in recent years, resulting as it has in a continuing erosion of huge volumes of traffic that would otherwise be available for transportation by public carriers, is a serious problem for the railroads and other common carriers. To the extent that this growth has occurred in bona fide private carriage, i.e., the transportation of one's own materials, supplies, and products in one's own vehicles within the scope and in furtherance of one's primary business enterprise (other than transportation), there is no room for complaint; but there is just cause for complaint as to motor carriage which although performed under the guise of private transportation is actually public transportation. Not only do the purveyors of the transportation service evade economic regulations; but in many instances payment of the Federal transportation excise taxes is also [fol: 29] avoided, for the tax on amounts paid for the transportation of property is not levied on proprietary transportation.

Various subterfuges are employed to evade economic regulation and avoid imposition of the transportation excise taxes. The one most commonly used is the so-called buy-and-sell method of operation involving the issuance of bills of sale, invoices, and other such instruments to make it appear that the commodities being transported are those of the vehicle owner when in fact the transaction is merely a device to provide transportation for hire without a certificate or permit and without payment of the transportation tax. Another is the blackhaul method of operation increas-



ingly engaged in by concerns that deliver in their own trucks articles which they manufacture or sell and then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or where they transport property they do not own, such transportation being performed only for the purpose of receiving compensation for the otherwise empty return of their trucks.

There are numerous variations but, whatever the precise nature of the subterfuge employed, carriage of this sort undermines the strength of the regulated for-hire carriers and in so doing it also injures the public which is largely dependent upon regulated for-hire carriage for its transportation requirements. Protection is needed from destructive competition of this kind.

The Interstate Commerce Commission has said that this is one of the problems of most serious concern to it in administration of the Interstate Commerce Act, that where so-called private carriage is a subterfuge for engaging in public transportation it constitutes a growing menace to shippers and carriers alike, being injurious to sound public transportation, promoting discrimination between shippers, and threatening existing rate structures. It was to curb just such practices that part II of the Interstate Commerce Act was enacted.

In the first session of the present Congress (Public Law 85-163, approved August 22, 1957) the Interstate Commerce Act was amended to prohibit one (except as otherwise specifically provided) from engaging in any "for-hire transportation business by motor vehicle" in interstate or foreign commerce without a certificate or a permit authorizing such transportation. This prohibition is expected to prove helpful in correcting certain of the abuses described, but it appears that loopholes may still remain. What is needed, in the opinion of the subcommittee, is a further prohibition to the effect that no person in any commercial enterprise other than a duly authorized or specifically exempt for-hire transportation business shall transport property by motor vehicle in interstate or foreign commerce unless such transportation is solely within the scope and in furtherance of a pri-

mary business enterprise (other than transportation) of such person.

With the Interstate Commerce Act amended in this way commercial highway transportation of property in interstate or foreign commerce would, with certain specific exemptions, be required to fall into one or another of three classes: (a) duly certificated common carriage, (b) duly permitted contract carriage, or (c) transportation solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter. Other commercial highway transportation, except as specifically provided would be prohibited. This, it is believed, would serve to correct most of the abuses that have arisen in the name of private carriage and yet would not in any way jeopardize or interfere with what might be called legitimate or bona fide private carriage. Indeed the "primary business test" contained in *Brooks Transportation Co. v. U.S.*, (340 U.S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute.

#### APPENDIX B TO EXHIBIT B TO COMPLAINT

*Portion of House Report No. 1922 of the Committee on Interstate and Foreign Commerce on R. 12832 relating to amendment of section 203(c) of the act*

#### PSEUDO-PRIVATE CARRIAGE

(Sec. 7, amending sec. 203(c) of the act)

The erosion of traffic of regulated carriers has also been caused to a considerable extent by the growth of "pseudo-private carriage" by truck. One of the subterfuges most commonly used in this type of carriage is the "buy-and-sell" arrangement, whereby fictitious bills of sale and invoices are used to make it appear that the commodities being transported by truck are those of the vehicle owner and operator and that the transportation involved is private carriage. The real business of persons engaged in this type of operation is, in fact, transportation, and the movement

of goods performed by them is not in furtherance of any primary, or bona fide business enterprise other than transportation.

In addition, business which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost.

The pseudo-private carriage is a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act. It constitutes a growing menace to shipper and carrier alike, and is not in the public interest. It is injurious to sound public transportation. It promotes discrimination between shippers and threatens the existing rate structures of regulated carriers. It makes possible the avoidance of payment of the Federal transportation of property tax, for this tax is not levied on the transportation of property owned by the carrier.

The Interstate Commerce Commission has found it most difficult to cope effectively with this problem under the present provisions of the Interstate Commerce Act. The Commission has urged the Congress for several years to make legislative changes in the act to eliminate these practices, and it drafted a bill to accomplish this objective, which was introduced as H.R. 5825, 85th Congress. That bill proposed to amend the definition of "private carrier" in section 203(a) (17) of the act by adding a proviso thereto to the effect that any person who purchases, transports and sells property for the purpose of fostering a highway transportation business is engaging in a public transportation service and shall be subject to economic regulation by the Commission.

During the committee's hearings on H.R. 5825, many witnesses expressed the fear that if the definition of a private

carrier of property by motor vehicle was changed, it would open the door to reconsideration of the concept of the "primary business" test of private carriage as enunciated by the Commission in the Lenoir Chair case (51 M.C.C. 65 (1949)) and by the United States Supreme Court in the Brooks case (Brooks Transportation Co. v. United States, 340 U.S. 925 (1951)).

In the Brooks case, the Supreme Court recognized the so-called primary business test as the governing criterion in establishing bona fide private carriage. Under that doctrine, if transportation is performed in furtherance of the primary business of the operator, even though a charge may be made for such service, the transportation is treated as bona fide private carriage. If, however, a bona fide noncarrier business is not established, the transportation is treated as for-hire.

This doctrine has been helpful to the bona fide private carriers. They are fearful that any amendment of the definition of "private carrier of property by motor vehicle" may result in an unsettling of the "primary business" test and require them to embark upon another long series of litigation similar to that which culminated in the Brooks decision.

In the first session of the 85th Congress the Interstate Commerce Act was amended (by Public Law 85-163) by the addition of section 203(c) which prohibits a person, except as otherwise specifically provided in the act, from engaging in any for-hire transportation business by motor vehicle in interstate or foreign commerce without a certificate or permit to authorize such transportation. This prohibition is expected to prove helpful in correcting certain abuses, but it appears that the abuses resulting from pseudo-private carriage are not adequately dealt with by section 203(c).

Under these circumstances several witnesses recommended, and this committee favors, the further amendment to section 203(c) of the act contained in section 7 of the reported bill. This amendment provides that no person shall, in connection with any other business enterprise, transport property by motor vehicle in interstate or foreign commerce unless such transportation is incidental to, and

in furtherance of, a primary business enterprise (other than transportation) of such person. There is no intention on the part of this committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in the Brooks case.

[fols. 32-42]

**ORDER**

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 3rd day of August, A. D. 1959.

**No. MC-C-1994**

**FRAERING BROKERAGE COMPANY, INC., INVESTIGATION  
OF OPERATIONS**

**No. MC-C-2055**

**EMMA SHANNON AND OTHERS, INVESTIGATION OF OPERATIONS**

These proceedings having been duly instituted, and full investigation of the matters and things involved having been made, and the said division having, on the date hereof, made and filed a report herein containing its findings of fact and conclusions thereon which report is hereby referred to and made a part hereof;

*It is ordered*, That the respondent in No. MC-C-1994, be, and it is hereby, notified and required to cease and desist forthwith, and thereafter to refrain and abstain, from all operations in interstate or foreign commerce of the character found in said division report to be unlawful, unless and until appropriate authority therefor is obtained.

*It is further ordered*, That respondents Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, in No. MC-C-2055, be, and they are hereby, notified and required to cease and desist forthwith, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce of the character



found in the said division report to be unlawful, unless and until appropriate authority therefor is obtained.

*It is further ordered*, That the statutory effective and compliance date of this order be, and it is hereby, fixed as September 18, 1959.

*And it is further ordered*, That proceeding No. MC-C-2055, as to J. T. Wilcox be, and it is hereby, discontinued.

By the Commission, division 1.

HAROLD D. MCCOY,  
Secretary.

(SEAL)

[fol. 43]

EXHIBIT C TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of April A. D. 1960.

No. MC-C-1994

FRAERING BROKERAGE COMPANY, INC., INVESTIGATION  
OF OPERATIONS  
(New Orleans, La.)

No. MC-C-2055

EMMA SHANNON AND OTHERS, INVESTIGATION OF OPERATIONS  
(San Antonio, Tex.)

Upon consideration of the records in the above-entitled proceeding, and of:

- (1) Petition of Fraering Brokerage Co., Inc., respondent in No. MC-C-1994, filed September 30, 1959, for reconsideration;
- (2) Joint petition of Emma Shannon and Richard J. Shannon, respondents in No. MC-C-2055, filed September 8, 1959, for reconsideration;

(3) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed October 16, 1959, to the petition in (1) above;

(4) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed September 25, 1959, to the petition in (2) above;

and good cause appearing therefor:

*It is ordered*, That the said petitions be, and they are hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law;

*It is ordered*, That the order of August 3, 1959, as indefinitely postponed with respect to statutory effective and compliance date, be and it is hereby, reinstated, and the statutory effective and compliance date is hereby fixed as May 23, 1960.

By the Commission.

HAROLD D. MCCOY,  
Secretary.

(SEAL)

[fol. 44]

[File endorsement omitted].

[fol. 47]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
Civil Action No. 2840

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE  
INTERSTATE COMMERCE COMMISSION—Filed July 21, 1960

Defendants, United States of America and Interstate  
Commerce Commission, answer the complaint, as follows:

I.

Defendants, for purposes of this action, admit the allegations in paragraphs numbered 1 through 4, except:

(a) With reference to paragraph 1, they aver that the investigation docketed as No. MC-C-2055, Emma Shannon

et al., Investigation of Operations, was instituted by order of the Commission, Division 1, entered November 5, 1956, and respectfully refer the Court to said order for an accurate and complete statement of the scope of that investigation.

(b) With reference to paragraph 4, they deny that the 1957 and 1958 amendments to the Interstate Commerce Act, [fol. 48] 49 U.S.C. § 303(c), 71 Stat. 411, 72 Stat. 574, should not have affected plaintiffs, and they deny further that the recommended report and order of the hearing examiner should have been adopted by the Commission, Division 1.

## II.

Defendants deny the allegations in paragraphs numbered 5 and 6, except, with reference to paragraph 6, they admit plaintiffs have been and are engaged in the business of buying and selling livestock, grain, fertilizer, molasses, salt and sugar, and that in the proceeding before the Commission no one questioned that the transportation by them of all of the named commodities, except sugar, was in furtherance of their primary business, as dealers in those commodities, and hence, was within the scope of lawful private carriage.

## III.

Defendants deny that the Commission is under any obligation to produce any or all of the documents listed in paragraph numbered 7, and they aver that the duty of presenting to this Court a certified copy of the record before the Commission, or any portion thereof, rests upon the plaintiffs.

## IV.

As defendants are without information or knowledge sufficient to form a belief as to the allegations in paragraph numbered 8, and furthermore, as the Commission, Chairman Winchell, by order entered June 2, 1960, upon consideration, inter alia, of the pendency of the instant action, [fol. 49] postponed from May 23, 1960, until further order

of the Commission the effective and compliance date as established by the assailed order of April 5, 1960, defendants deny the allegations in paragraph numbered 8.

## V.

In further answer to the complaint, defendants aver that the Commission properly found upon substantial evidence of record and the applicable law that the plaintiffs have been and are engaged in transportation in interstate commerce of sugar from Supreme, La., to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of section 206(a) or 209(a) of the Interstate Commerce Act, 49 U.S.C. §§ 306(a) or 309(a), and that the actions of the Commission were valid and lawful in all respects.

Wherefore, the United States of America and the Interstate Commerce Commission pray that the relief sought in the complaint be denied, and that the complaint be dismissed.

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.

Robert A. Bicks, Acting Assistant Attorney General.

Russell B. Wine, United States Attorney, San Antonio, Texas.

Attorneys for United States of America.

Fritz R. Kahn, Attorney, Interstate Commerce Commission, Washington 25, D. C.

Robert W. Ginnane, General Counsel.

Attorneys for Interstate Commerce Commission.

[fol. 50] Certificate of Service (omitted in printing).

[fol. 51] Certificate of Service by Mail (omitted in printing).

[fol. 52] [File endorsement omitted]

[fol. 53] [File endorsement omitted]

[fol. 54]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON  
d/b/a E. and R. SHANNON, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE  
COMMERCE COMMISSION, Defendants.

MOTION OF RED BALL MOTOR FREIGHT, INC., AND DENVER-  
AMARILLO RED BALL MOTOR FREIGHT, INC., FOR LEAVE TO  
INTERVENE AS DEFENDANTS—Filed July 26, 1960

Come now Red Ball Motor Freight, Inc., and Denver-  
Amarillo Red Ball Motor Freight, Inc., and respectfully  
move this Honorable Court for leave to intervene as De-  
fendants pursuant to 28 U.S.C.A., Section 2323, and Rule  
24 F.R.C.P., and for cause would show:

I.

Red Ball Motor Freight, Inc., is a common carrier of  
property, operating under Interstate Commerce Commis-  
sion Certificate No. MC-2229 and Subs thereunder. It is a  
corporation, organized and existing under the laws of the  
State of Delaware, with its principal office and place of busi-  
ness in Dallas, Dallas County, Texas.

Denver-Amarillo Red Ball Motor Freight, Inc., is also a  
common carrier of property, operating under Interstate  
Commerce Commission Certificate No. MC-105265 and Subs  
thereunder.



[fol. 55] Wherefore, Red Ball Motor Freight, Inc., and Denver-Amarillo Red Ball Motor Freight, Inc., pray that they be permitted to intervene as parties defendant herein, on the side of the Interstate Commerce Commission, and that they be granted leave to file the Answer attached herefo.

Respectfully submitted,

Clark, Mathews, Thomas, Harris and Denias.

Charles D. Mathews.

James H. Keahey, P. O. Box 858, 1020 Brown Building, Austin 65, Texas.

Attorneys for Intervenors, Red Ball Motor Freight, Inc. and Denver-Amarillo Red Ball Motor Freight, Inc.

[fol. 59]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
Civil Action No. 2840

[Title omitted]

MOTION OF BROWN EXPRESS, INC., CENTRAL FREIGHT LINES INC., TEXAS-ARIZONA MOTOR FREIGHT, INC., ~~REGULAR~~ COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND TEXAS TANK TRUCK CARRIERS ASSOCIATION, INC., FOR LEAVE TO INTERVENE AS DEFENDANTS—Filed August 12, 1960.

To the said Honorable Court:

Come now Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., the Regular Common Carrier Conference of the American Trucking Associations, Inc., and the Texas Tank Truck Carriers Association, Inc., pursuant to the provisions of the United States Code, Title 28, Section 2323, and Rule 24, F.R.C.P., and move for leave to intervene as defendants in this action, to

file the answer attached hereto, and to participate by brief, oral argument and otherwise in presenting to the Court their interest in the matters and questions in controversy. For grounds movants would show:

## I

The above-styled and numbered cause is an action by plaintiffs to enjoin, annul and set aside a certain final order of the Interstate Commerce Commission in its Docket MC-C-2055 requiring plaintiffs to cease and desist forthwith, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce of the character found in the Report of the Commission, Division 1, to be unlawful, involving the transportation of sugar from Supreme, Louisiana, to San Antonio and other Texas points, unless and until appropriate authority therefor is obtained from said Commission. Jurisdiction is invoked by plaintiffs under the provisions of the United States Code, Title 28, Sections 2321 et seq., as well as other related provisions of said Code.

[fol. 60]

## II

Movants, jointly and severally, are interested in this controversy, in the question of pseudo-private carriage of property, and in the matter of proper and uniform interpretation and enforcement of Section 203(c) of the Interstate Commerce Act which are involved in the Commission's decision and order now before this Court. In this connection movants would show that:

1. Brown Express, Inc., a Texas corporation with general offices at San Antonio, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-46054 and in sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-46054 Brown Express, Inc. is authorized to transport general commodities, including sugar, between Houston, San Antonio, and over 350 other Texas points. In accordance with said certificated authority, and by means of its

large fleet of equipment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Brown Express, Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

2. Central Freight Lines Inc., a Texas corporation with general offices at Waco, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-30867 and sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-30867 Central Freight Lines Inc. is authorized to transport general commodities, including sugar, between Houston, San Antonio, and over 450 other Texas points. In accordance with said certificated authority, and by means of its large fleet of equipment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Central Freight Lines Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

3. Texas-Arizona Motor Freight, Inc., a New Mexico corporation with general offices at El Paso, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-59894 and sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-59894 Texas-Arizona Motor Freight, Inc. is author-

ized to transport general commodities, including sugar, between Houston, San Antonio, and over 125 other Texas points and over 250 other points in New Mexico, Arizona and California. In accordance with said certificated authority, and by means of its large fleet of equipment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Texas-Arizona Motor Freight, Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

4. The Regular Common Carrier Conference of the American Trucking Associations, Inc. with headquarters at Washington, D. C., is a non-profit incorporated association of more than 2,000 duly authorized general commodity common carriers of property by motor vehicle, such as Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., and Red Ball Motor Freight, Inc. The members of the Regular Common Carrier Conference comprise a division or Conference of the American Trucking Associations, Inc., a non-profit corporation constituting the national trade association of the trucking industry. The Regular Common Carrier Conference is organized primarily to foster, protect and promote the interests of general commodity common carriers of freight and to advance such interests through cooperation and organization, including protection of the franchised operations of such common carriers from unlawful and unauthorized competition from other for-hire carriers.

[fol. 62] 5. The Texas Tank Truck Carriers Association, Inc., with headquarters at Austin, Texas, is a non-profit Texas corporation whose members are irregular route carriers of various types of property, including sugar, by tank and other specialized types of motor vehicles operated in Texas and in numerous other states and areas. The members of the Texas Tank Truck Carriers Association, Inc. who are engaged in such transportation in interstate and foreign commerce within Texas, Louisiana and elsewhere

operate pursuant to franchises and operating rights duly and lawfully granted to such members by the Interstate Commerce Commission in the form of certificates of public convenience and necessity, or in the form of contract carrier permits. The Texas Tank Truck Carriers Association, Inc. is organized primarily to foster, protect and promote the interests of its members through cooperation and organization, including protection of the franchised operations of such members from unlawful and unauthorized competition from other for-hire carriers.

Movants' substantial interest in the outcome of this litigation and of this Court's decision concerning the lawfulness of the disputed transportation operation of plaintiffs without appropriate authority from the Interstate Commerce Commission is further shown by the fact that this Court's decision will unquestionably have a material bearing upon the competition that certificated and permitted common and contract carriers of all types of property will encounter in the future not only in this particular area but throughout the Southwest and, indeed, the entire nation. Such competition will vastly increase if construed to be lawful under the terms of said Section 203(c) of the Act, as amended, and will inevitably render it more difficult for regulated carriers to provide adequate and continuous service to the general public as contemplated by the Interstate Commerce Act and the National Transportation Policy and as required by the terms and conditions of the certificates issued to movants and to all certificated common carriers.

Therefore, movants have a vital and direct interest in the controversy and questions involved in this litigation within the meaning of the United States Code, Title 28, Section 2323, and Rule 24, F.R.C.P.

### III

The granting of this motion will not unduly delay or prejudice the adjudication of the rights of the original [fol. 63] parties. Movants' proposed pleading would in no respect enlarge or change the issues raised by the pleadings of the original parties. Further, movants are advised of the dates set by the Court for the filing of plaintiffs'



opening brief, defendants' opening brief, and plaintiffs' reply brief, and, if leave to intervene is granted, movants are prepared to comply therewith.

Wherefore, Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., the Regular Common Carrier Conference of the American Trucking Associations, Inc., and the Texas Tank Truck Carriers Association, Inc. pray that they be permitted to intervene as parties defendant herein, on the side of the United States of America and the Interstate Commerce Commission, and that they be granted leave to file the Answer attached hereto.

Respectfully submitted,

Charles E. Crenshaw, Perry-Brooks Building, Austin 1, Texas.

Roland Rice, 618 Perpetual Building, Washington 4, D. C.

Phillip Robinson, 401 Perry-Brooks Building, Austin 1, Texas.

Attorneys for Movants, Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc., Texas Tank Truck Carriers Association, Inc.

#### Of Counsel:

Rice, Carpenter and Carraway, 618 Perpetual Building, Washington 4, D. C.

Smith, Robinson and Starnes, 401 Perry-Brooks Building, Austin 1, Texas.

[fol. 64] Notice of Motion (omitted in printing).

#### REQUEST FOR SETTING

Come now Charles E. Crenshaw, Roland Rice, and Phillip Robinson, attorneys for Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., the Regular Common Carrier Conference of the American

Trucking Associations, Inc., and the Texas Tank Truck Carriers Association, Inc. and request that the foregoing Motion For Leave To Intervene As Defendants be placed on the motion docket of the Court for Monday, August 15, 1960, or as soon thereafter as the business of the Court will allow.

Charles E. Crenshaw  
Roland Rice  
Phillip Robinson

[fol. 65] Proof of Service (omitted in printing).

[fol. 66] [File endorsement omitted]

[fol. 126]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON, d/b/a  
E. and R. SHANNON, Complainants,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE  
COMMERCE COMMISSION, Respondents,

RED BALL MOTOR FREIGHT, INC., DENVER-AMARILLO RED BALL  
MOTOR FREIGHT, INC., BROWN EXPRESS, INC., CENTRAL  
FREIGHT LINES, INC., TEXAS-ARIZONA MOTOR FREIGHT  
INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN  
TRUCKING ASSOCIATIONS, INC., and TEXAS TANK  
TRUCK CARRIERS ASSOCIATION, INC., Intervenor.

ORDER ALLOWING INTERVENTION AS DEFENDANTS—Signed  
August 20, 1960 and Entered August 24, 1960

This Cause coming before this Statutory Court convened  
pursuant to provisions of applicable statutes, on the mo-

tions of the Red Ball Motor Freight, Inc. and Denver-Amarillo Red Ball Motor Freight, Inc., and of the Brown Express, Inc., Central Freight Lines, Inc., Texas-Arizona Motor Freight, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc. and Texas Tank Truck Carriers Association, Inc. for leave to intervene as party defendants, and it appearing that the intervention should be permitted, it is therefore

Ordered that the said motions be granted, and the Red Ball Motor Freight, Inc., Denver-Amarillo Red Ball Motor Freight, Inc., Brown Express, Inc., Central Freight Lines, Inc., Texas-Arizona Motor Freight, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc., and Texas Tank Truck Carriers Association, Inc., Intervenors, are hereby made parties defendant and their tendered answer be filed, subject to all legal objections which are reserved to the hearing on the merits. Briefing schedules, etc. shall be that of defendants.

[fol. 127] Dated at Austin, Texas, this 20 day of August, 1960.

By the Court:

John R. Brown, United States Circuit Judge, Allen B. Hannay, United States District Judge for the Southern District of Texas, Ben H. Rice, Jr., United States District Judge for the Western District of Texas.

[fol. 128]

[File endorsement omitted]

[fol. 148]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
Civil Action No. 2840

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EMMA SHANNON and RICHARD J. SHANNON, d/b/a  
E. AND R. SHANNON, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE  
COMMERCE COMMISSION, Defendants.

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**Trial Brief of Defendant Interveners Brown Express, Inc.,  
Central Freight Lines Inc., Texas-Arizona Motor  
Freight, Inc., Regular Common Carrier Conference of  
American Trucking Associations, Inc., and Texas Tank  
Truck Carriers Association, Inc.—Served September 7,  
1960**

To the Said Honorable Court:

. . . . .

[fol. 153]

**Interveners' Services, Facilities and Interests**

Brown Express, Inc., a Texas corporation with general offices at San Antonio, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-46054 and in sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-46054 Brown Express, Inc. is authorized to transport general commodities, including sugar, between Houston, San Antonio, and over 350 other Texas points. In accordance with said certificated authority, and by means of its large fleet of equip-

ment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Brown Express, Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

Central Freight Lines Inc., a Texas corporation with general offices at Waco, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating [fol. 154] rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-30867 and sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-30867 Central Freight Lines Inc. is authorized to transport general commodities, including sugar, between Houston, San Antonio, and over 450 other Texas points. In accordance with said certificated authority, and by means of its large fleet of equipment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Central Freight Lines Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

Texas-Arizona Motor Freight, Inc., a New Mexico corporation with general offices at El Paso, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-59894 and sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-59894 Texas-Arizona Motor Freight, Inc. is authorized to transport general commodities, including sugar,



between Houston, San Antonio, and over 125 other Texas points and over 250 other points in New Mexico, Arizona and California. In accordance with said certificated authority, and by means of its large fleet of equipment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Texas-Arizona [fol. 155] Motor Freight, Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

The Regular Common Carrier Conference of the American Trucking Associations, Inc. with headquarters at Washington, D. C., is a non-profit incorporated association of more than 2,000 duly authorized general commodity common carriers of property by motor vehicle, such as Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., and Red Ball Motor Freight, Inc. The members of the Regular Common Carrier Conference comprise a division or Conference of the American Trucking Associations, Inc., a non-profit corporation constituting the national trade association of the trucking industry. The Regular Common Carrier Conference is organized primarily to foster, protect and promote the interests of general commodity common carriers of freight and to advance such interests through cooperation and organization, including protection of the franchised operations of such common carriers from unlawful and unauthorized competition from other for-hire carriers.

The Texas Tank Truck Carriers Association, Inc., with headquarters at Austin, Texas, is a non-profit Texas corporation whose members are irregular route carriers of various types of property, including sugar, by tank and other specialized types of motor vehicles operated in Texas and in numerous other states and areas. The members of the Texas Tank Truck Carriers Association, Inc. who are engaged in such transportation in interstate and foreign [fol. 156] commerce within Texas, Louisiana and elsewhere

operate pursuant to franchises and operating rights duly and lawfully granted to such members by the Interstate Commerce Commission in the form of certificates of public convenience and necessity or in the form of contract carrier permits. The Texas Tank Truck Carriers Association, Inc. is organized primarily to foster, protect and promote the interests of its members through cooperation and organization, including protection of the franchised operations of such members from unlawful and unauthorized competition from other for-hire carriers.

### Statute, Rule and Decisions Authorize Intervention

These interveners, in connection with the filing of their Motion For Leave To Intervene, submitted copies of a separate Memorandum Of Authorities in which Article 2323 and Rule 24(b) are quoted in pertinent part and are discussed in connection with some of the many decisions applying such statute and rule, including *S. E. C. v. United States Realty and Improvement Co.*, 310 U.S. 434, 60 S.Ct. 1044 (1940); and *Textile Workers Union of America v. Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955).

Since the said Memorandum is already before the Court repetition of its contents in this brief is considered unnecessary.

### Commission's Order Consistent With Prior Commission Interpretation of Act, With Its Past and Recent Legislative History, and With Objectives of National Transportation Policy

As stated, the content of this brief has been intentionally restricted to a showing of the justiciable interest of interveners. As conceived by interveners, however, such a showing inevitably requires consideration by the Court of the nature and purposes of the economic regulation of for-hire carriers to which interveners are subject and from which plaintiffs claim exemption in their westbound handling of sugar.

[fol. 169] Secretary's Certificate (omitted in printing).

[fol. 170]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Division 1, Washington, D. C.

No. MC-C-2055

NOV 21 1956

EMMA SHANNON AND RICHARD J. SHANNON,  
DOING BUSINESS AS E. AND R. SHANNON, AND  
J. T. WILCOX, DOING BUSINESS AS WILCOX  
BROKERAGE COMPANY—  
INVESTIGATION OF OPERATIONS

ORDER—November 5, 1956

It appearing, That there is reason to believe that Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, of San Antonio, Texas, have been and are engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle subject to the provisions of Part II of the Interstate Commerce Act;

It further appearing, That there is not in force a certificate of public convenience and necessity or permit issued by this Commission authorizing said Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, to engage in operations as a common or contract carrier;

It further appearing, That J. T. Wilcox, doing business as Wilcox Brokerage Company, of San Antonio, Texas, may have participated in and aided, abetted, counseled, induced and procured the said Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, in the transportation aforesaid, and thereby is a party interested in such transportation, and also may have been and is engaging in the practice of a broker of such transportation without a broker's license issued by the Commission authorizing him to engage in such transactions, in violation of Section 211, and good cause appearing therefor;

It is ordered, That an investigation be, and it is hereby instituted under Section 204(c) of said Act, into and con-

cerning the motor carrier operations of said Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, with a view to determining whether they have been and are engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle, in violation of Section 206(a)(1) or 209(a)(1) of said Act, and into the practices of said J. T. Wilcox, doing business as Wilcox Brokerage Company, with a view of determining whether he has been and is engaging in transactions as a broker of such transportation, in violation of Section 211 of said Act, and to issuing such orders and taking such other and further action as the facts and circumstances may appear to warrant;

It is further ordered, That said Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, 1716 S. San Marcos Street, San Antonio, Texas, and J. T. Wilcox, doing business as Wilcox Brokerage Company 136 Shadwell Drive, San Antonio, Texas, be, and they are hereby made respondents in this proceeding;

It is further ordered, That this proceeding be set for hearing at a time and place to be fixed;

[fol. 171] It is further ordered, That the Bureau of Inquiry and Compliance shall give timely notice to the respondents prior to the hearing to be held herein with respect to the particular operations alleged to have been performed in violation of said Sections 206(a)(1), 209(a)(1), and 211 of said Act;

And it is further ordered, That a copy of this order be served upon said respondents and that notice of this proceeding be given to the public by posting a copy of this order in the Office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 1.

Harold D. McCoy, Secretary.

(SEAL)

[fol. 172]

## BEFORE THE INTERSTATE COMMERCE COMMISSION

No. MC-C-2055

EMMA SHANNON and RICHARD J. SHANNON, DBA E. AND R.  
SHANNON and J. T. WILCOX, DBA WILCOX BROKERAGE  
COMPANY—INVESTIGATION OF OPERATIONS

ORDER—February 12, 1957

Present: Everett Hutchinson, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

It appearing, That by order of November 5, 1956, the Commission, Division 1, instituted the above-entitled proceeding which is one which the Commission is required by the Interstate Commerce Act to refer to a joint board;

And it further appearing, That the joint board named below is the proper board to which said matter should be referred;

It is ordered, That the above-entitled matter be, and it is hereby, referred to Joint Board No. 32 for hearing on the 29th day of March A. D. 1957, at 9:30 o'clock a.m. United States Standard Time, at the Hilton Hotel, San Antonio, Tex., and for the recommendation of an appropriate order thereon accompanied by the reasons therefor;

It is further ordered, That in the event the said joint board shall waive action on the matter by a failure of its members to appear at the time and place the hearing is assigned and to participate therein, the above-entitled matter thereupon shall be heard by Examiner Rene J. Mittelbronn, who shall recommend an appropriate order accompanied by the reasons therefor.

And it is further ordered, That any party desiring to be notified of any change in the time or place of the said hearing (at his own expense if telegraphic notice becomes necessary) shall inform the Interstate Commerce Commission, Washington, D. C., to that effect by notice which must reach the Commission within ten days from the date of service



hereof, and that the date of mailing of this order shall be considered as the time when the order is served.

Dated at Washington, D. C. this 12th day of February, A. D. 1957.

By the Commission, Commissioner Hutchinson.

Harold D. McCoy, Secretary.

(SEAL)

[fol. 174]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-2055

In the Matter of

EMMA SHANNON and RICHARD J. SHANNON, DBA E. AND R.  
SHANNON and J. T. WILCOX, DBA WILCOX BROKERAGE  
COMPANY—INVESTIGATION OF OPERATIONS

**Transcript of Hearing**

Parlor "F", Hilton Hotel,  
San Antonio, Texas,  
Friday, March 29, 1957.

Met, pursuant to notice, at 9:30 a.m.

Before:

Rene J. Mittelbronn, Examiner.

**APPEARANCES:**

William W. Guild, 812 Texas and Pacific Building, Fort Worth, Texas, appearing for the Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Walter C. Wolff, Sr., and Walter C. Wolff, Jr., James K. Building, 417 South Main, San Antonio, Texas, appearing for the respondents.

[fol. 176]

## PROCEEDINGS

Exam. Mittelbronn: Come to order, please.

The Interstate Commerce Commission has set for hearing at this time and place Docket MC-C-2055.

Under the Commission's Order this proceeding is designed to institute an investigation to determine the operations of Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon and J. T. Wilcox, doing business as Wilcox Brokerage Company.

More specific purpose of the investigation is to determine whether or not the particular operations just described are in any way violative of the Interstate Commerce Act.

Are the parties ready to proceed? Who appears for the respondents?

Mr. Wolff, Jr.: Walter Wolff, Senior, my father, and Walter Wolff, Jr., Attorneys for both Mr. Wilcox and Mr. Shannon.

Exam. Mittelbronn: Are you gentlemen admitted to practice before the Commission?

Mr. Wolff, Jr.: I don't believe I am.

Mr. Wolff, Sr.: I am.

Exam. Mittelbronn: You are, sir?

Mr. Wolff, Sr.: Yes.

Exam. Mittelbronn: All right.

Off the record.

(Discussion off the record.)

[fol. 177] Exam. Mittelbronn: On the record.

In the discussion that just occurred off the record it was ascertained that the senior partner of the firm representing respondents in this proceeding has already taken the initial steps to become a registered practitioner with the Commission.

Any other parties appearing in behalf of respondents?

(No response.)

Exam. Mittelbronn: Representatives for the—

Mr. Guild: William W. Guild, I am an attorney for the Bureau of Inquiry and Compliance of the Interstate Commerce Commission.

Exam. Mittelbronn: Are you ready to proceed, Mr. Wolff?

Mr. Wolff, Jr.: Yes, sir.

Mr. Guild: As I understand it, the Bureau of Inquiry and Compliance will be the initial proceeder in this case.

Exam. Mittelbronn: Yes.

Mr. Guild: And at this time I should like to say that we had had a subpoena issued for the production of certain documents. However, due to the inconvenience that it might cause Mr. Shannon to have those documents introduced as exhibits, the attorneys for the respondents and myself have agreed to the stipulation for the introduction of an exhibit which sets out the pertinent facts of those documents in lieu of that subpoena, so we would not file that subpoena at this time.

[fol. 178] Exam. Mittelbronn: Does the subpoena direct within its contents how it shall be returned?

Mr. Guild: No, it does not.

Exam. Mittelbronn: Off the record.

(Discussion off the record.)

Exam. Mittelbronn: On the record. Proceed.

So the record will be complete in the discussion just occurred off the record the attention of the respondents was called to rule 56, subparagraph (d) of the Commission's General Rules of practice, and they were advised that they could proceed in introducing documents according to said rule. The parties, however, reached an agreement which will now be stated by counsel Guild.

#### STIPULATION OF PARTIES AS TO INTRODUCTION OF EXHIBITS

Mr. Guild: The attorneys for the respondents and attorney for the Bureau of Inquiry and Compliance agree and stipulate to the introduction of Exhibit No. 1, which is a list of 15 shipments showing the invoice from J. Aron to E. and R. Shannon, which shows the cost of the sugar to E. and R. Shannon less two per cent discount, a dray receipt number, consecutively in the exhibit, which shows the date the sugar was received by E. and R. Shannon from J. Aron Company at Supreme, Louisiana, the respective sales slips on the sugar so purchased, which reflect the sale which E. and R. Shannon made of the sugar at San Antonio to the ultimate consumer and the date on which the sale took place, and the [fol. 179] resale price received by E. and R. Shannon.

It also contains a column showing the difference in price between what E. and R. Shannon paid for the sugar and what they received in the sale of said sugar.

It further contains a column showing the net profit in cents per 100 pounds of sugar realized by E. and R. Shannon from the sale of said sugar.

Mr. Wolff, Jr.: I might add one thing to that.

Let the record show that it was mentioned that the cost price was less two per cent discount, and that the resale price delivered in San Antonio also contains the same discount figure. Let the record further show that the respondent is merely stipulating that the figures contained on this exhibit are the same figures that are contained in the original instruments, and are not admitting that any of the figures or instruments are material in this particular hearing going to the question of whether or not the parties are a carrier required to be licensed.

On the contrary we urge our objection either at this time or at the proper time when they are going to be actually admitted into evidence that they are irrelevant.

Mr. Guild: Well, the Bureau at this time offers that Exhibit No. 1 into evidence subject to the parties' objection that they are not material.

Mr. Wolff, Jr.: Let the record reflect that when counsel [fol. 180] offered the instruments that the respondent objects to same because they are irrelevant to any issue in this case, and merely show several isolated sales of the parties and purchases by the respondents, and the net results of same as setting out a certain figure of profit has nothing to do with the particular hearing in the determination of whether or not either of the respondents is in the trucking business.

The rail rates and trucking rates are complete disassociated from the particular figures that are shown in the last column as the profit, but instead the profit that is contained in the last column is the average profit that a sugar merchant makes in his sales in this locality, and the rate, trucking rate, has nothing to do with it, and for that reason we believe that the exhibit is completely immaterial.

Mr. Guild: Are you ready to proceed?

Exam. Mittelbronh: No. I am going to rule.

The Examiner rules that the document introduced and offered into evidence, which will hereby be identified or designated as Exhibit No. 1, that said objection goes to an element of the merits, if any, to this entire proceeding, and the objection made by counsel in that light goes to the weight, if any, that might be attributed to this document.

(Commission's Exhibit No. 1, Counsel Guild, was marked for identification.)

Exam. Mittelbronn: Under those circumstances it is re-  
[fol. 181] ceived in evidence and the objection is overruled.

(Commission's Exhibit No. 1, Counsel Guild, was received in evidence.)

Mr. Wolff, Jr.: May I inquire, under the rules, sir, I don't believe it's necessary for us to make exceptions to any of your rulings?

Exam. Mittelbronn: Exceptions are automatic, yes.

Mr. Wolff, Jr.: Yes.

Exam. Mittelbronn: Raise them, however, on brief. Otherwise they will be considered waived.

Mr. Guild: I would like to have an exhibit marked for identification as Exhibit No. 2. You want me to identify it?

Exam. Mittelbronn: Describe it, yes.

Do the parties have a copy?

Mr. Guild: Yes. About these tariffs.

Mr. Wolff, Jr.: Yes.

Mr. Guild: An exhibit showing rail rates in carload and less carload quantities on sugar, beet or cane, between Supreme, Louisiana and San Antonio, Texas, effective May 15, 1956 through August 30, 1956.

Exam. Mittelbronn: The exhibit just described and the rates referred to are rail rates.

(Commission's Exhibit No. 2, Counsel Guild, was marked for identification.)

Mr. Guild: The parties have stipulated to the introduction of that exhibit.

[fol. 182] Exam. Mittelbronn: It is stipulated that the tariff authority shown on this document is correct in every way?



Mr. Wolff, Jr.: Yes, sir. We stipulate that the tariffs as contained on that instrument, being the rail rates from Supreme, Louisiana to San Antonio, Texas, those in both carload lots and less than carload lots, are the correct tariffs but, of course, urge the same objection that we urged to the introduction of the first exhibit, in that this is a document that attempts to connect up the rates with the net profit, and by the same objection we urge that the rates not be introduced into evidence because they are completely irrelevant and show no correlation whatsoever between the net profit and the rates, and further that the rates, themselves, are immaterial and irrelevant to the question before the Examiner.

Exam. Mittelbronn: All right.

Rates as contained in tariffs published with the Interstate Commerce Commission, those tariffs are and have the effect of a federal statute by law. Such being the case without any such document as this, rates in tariffs are taken official notice of by this agency and by the Federal Courts, and judicial notice is taken of them.

In that light the document just described will be identified as Exhibit No. 2 and received in evidence.

(Commission's Exhibit No. 2, Counsel Guild, was received in evidence.)

[fol. 183] Mr. Wolff, Jr.: Might I ask a question, sir?

Exam. Mittelbronn: Yes, sir.

Mr. Wolff, Jr.: We, of course, agree that those are the correct rates. Our objection is merely going to the relevancy of them and—

Exam. Mittelbronn: Relevancy and what weight, if any, that this Commission might attribute to them.

Mr. Wolff, Jr.: Yes.

Exam. Mittelbronn: That is understood.

Mr. Guild: Request to have an exhibit identified as Exhibit No. 3, which shows the regular route common motor carrier rates on sugar, beet or cane, between Supreme, Louisiana and San Antonio, Texas, effective May 15, 1956 through August 30, 1956. We offer that at this time by stipulation of the parties, respondents and the Bureau of Inquiry and Compliance.

(Commission's Exhibit No. 3, Counsel Guild, was marked for identification.)

Exam. Mittelbronn: Unquestionably the same objection is made.

Mr. Wolff, Jr.: Yes, sir, the same objection as to relevancy, but we stipulate those are the correct rates, themselves.

Exam. Mittelbronn: All right. The exhibit just described will be identified as Exhibit No. 3 and received.

(Commission's Exhibit No. 3, Counsel Guild, was received in evidence.)

[fol. 184] Mr. Guild: I would like to call Mr. Whitehead to the stand.

Exam. Mittelbronn: Just a moment.

Off the record.

(Discussion off the record.)

Exam. Mittelbronn: Proceed, sir.

Mr. Guild: Mr. Whitehead.

LEON J. WHITEHEAD was sworn and testified as follows:

Direct examination.

By Mr. Guild:

Q. State your name and where you reside.

A. Leon J. Whitehead. My address is 576 U. S. Post Office and Federal Building, San Antonio.

Q. For whom do you work, Mr. Whitehead?

A. Interstate Commerce Commission, Bureau of Motor Carriers.

Q. For how long have you worked for them?

A. I have been employed by the Bureau of Motor Carriers, Interstate Commerce Commission, since 1938, except for a short period in '53, '54 and half of '55 when I was employed as Director of Compliance and Safety for Strickland Transportation Company at Dallas, Texas. I resumed employment with the Commission on last June 1.

Q. What are your duties briefly?

A. I am District Supervisor with headquarters at San Antonio, Texas, charged with the administration of Part 2

of the Interstate Commerce Act, the rules and regulations [fol. 185] promulgated by the Commission, in the 71 counties, South Texas, territory, which entails the administration over all portions of regulation relating to Motor Carriers, and includes the investigations of carriers' records in many respects, including the allegations of unlawful operations, unlawful practices.

Q. Did you investigate E. and R. Shannon's operations?

A. I did.

Q. Pursuant to that investigation did you examine any documents in their business records?

A. I did.

Q. Were those the documents that are listed on Exhibit 1 heretofore introduced into evidence?

A. Those are the documents.

Q. Would you explain your investigation as it related to the examination of those documents?

A. The first inquiry of Mr. Shannon was made in August, at which time his bookkeeper was not present, and he requested that I return at a later date, and I went back, I think, on September 19, 19 or 20, at which time the documents were produced and examination of those documents was made and pencil notes of the content of the documents and identity of the documents was made at that time.

I was presented with a folder, an ordinary manila folder, containing the information I desired.

However, desiring to extend my investigation over a [fol. 186] little broader period I requested the prior file of the same nature and it was furnished, and I took notes from a representative number of the transactions contained in those files, limiting my investigation to the greatest period possible, that is, in extent of time, and attempted to obtain a representative picture of the transportation of sugar by motor vehicle.

Exam. Mittelbronn: Exactly what facts gave rise to this examination of the books of respondents?

The Witness: Mr. Examiner, do you mean in what manner was I assigned to this job?

Exam. Mittelbronn: Well, that might be the answer.

The Witness: I was assigned to this job by my superior, Mr. R. K. Hagerty, District Director at Fort Worth, Texas.

Exam. Mittelbronn: You have no knowledge of the facts, whether complaint by some other carrier or was the audit of the respondents' books a measure of routine investigation or what?

The Witness: I would say routine, Mr. Examiner. I was assigned to the chore by my superior and, of course, I had no alternative but to complete the investigation in that manner.

Exam. Mittelbronn: Proceed.

By Mr. Guild:

Q. In connection with the Examiner's question you just recently took over the San Antonio office?

A. June 1, 1956.

Q. And did you state the date on which you commenced [fol. 187] this investigation approximately?

A. That is a matter of memory. I think about September 19 or 20.

Q. In 1956?

A. 1956.

Q. Now, from your examination of those documents the dates listed under the invoice number, on sheet 1 of Exhibit 1, that would be 5-14-56?

A. 5-16-56. All of these transactions occurred and were completed in 1956.

Q. And what is the dray receipt?

A. The dray receipt is represented to me as a document executed by the J. Aron Company sugar refinery at Supreme, Louisiana at the time the truck appeared to load sugar, and shows the quantity of sugar loaded, the time the truck came in, the time it went out, the truck license number, and the driver's name, as I recall.

Q. Whose truck?

A. The truck of E. and R. Shannon, San Antonio.

Q. Now, what are the sales slips?

A. The sales slips were represented to me as a document executed in the offices of E. and R. Shannon in San Antonio relating the information to the consignee of the sugar, the quantity and kind of the sugar, and the price which it was delivered to them.

[fol. 188] Q. Now, I notice on this exhibit the consignee, the last name is given, like Lawler, Judson, Knowlton, Barq's, and Guerra appear. Could you give us the full name on those and who they are?

A. I believe I can give you the full names. Lawler relates to H. T. Lawler, a wholesale grocery in San Antonio. Judson is the Judson Candy Company. Knowlton is a dairy. Barq's is a bottling company. Guerra, at the bottom, is a wholesale grocer in Laredo.

Q. During your investigation of this respondent did Mr. Shannon explain the modus operandi of his handling of the sugar?

A. Well, Mr. Shannon in connection with Mr. Wilcox, and I had some conversations concerning—

Exam. Mittelbronn: It will be understood that the testimony now being given is your opinion of the conversation of these gentlemen inasmuch as apparently they are not here.

Mr. Guild: Yes sir, they are.

Mr. Wolff, Jr.: Yes, sir, they are here.

Exam. Mittelbronn: They are here?

Mr. Guild: Those are the respondents, both of them.

Exam. Mittelbronn: It will be understood as your understanding of the conversation unless otherwise contradicted. Proceed.

A. We had several conversations concerning this inas- [fol. 189] much as it's always my intent to obtain as much information surrounding these matters as is possible to possibly limit the investigation or eliminate the investigation, or to proceed with the investigation.

My conversations indicated to me, and it's my understanding, that Mr. Shannon, who is the operating manager of E. and R. Shannon, is in the business of buying and selling livestock, feedstuffs, salt and is a rather large operator in that respect, and in that connection he operates some trucks, and makes a practice of loading those trucks, for example, to Southern Louisiana or in that vicinity, unloads them and returns with this sugar, and on occasion will send an empty truck over to load sugar and bring it back to San Antonio.



Mr. Shannon very vehemently declares that this is a legitimate business of his, that he is in the sugar business. Investigation was prompted, of course, to determine in my mind whether the haul is for hire compensation or subject to Part 2 of the Interstate Commerce Act, or whether Mr. Shannon is a private carrier, exempt from all provisions of the Act except the motor carrier safety regulations.

My discussions indicated to me that there was a large area of doubt as to the legality of those operations.

By Mr. Guild:

Q. Well, did Mr. Shannon explain his handling of the sugar? That was the first question. That is, in the transportation and delivery of same.

[fol. 190] A. The mechanics of the loading and transportation, unloading of the trucks, was explained as one wherein the sugar is ordinarily loaded at the refinery and unloaded at the place of business of the consignee. However, on some occasions some lots of sugar are unloaded into a warehouse and placed in inventory, from which small lots are sold, and I believe the figure at that time given me was from 1 to 25 bags to small purchasers.

Q. That would mean that the bulk of the sugar was delivered direct to the consignee?

A. To a consignee, that is my understanding.

Q. From the truck?

A. That is my understanding.

Q. Will you explain why that in his operations he felt that it was necessary to deliver it direct to the consignee from the truck?

A. Yes. Mr. Shannon and Mr. Wilcox and I discussed that feature, and I am of the understanding that their margin of profit in the sugar transactions is rather narrow, and the cost of unloading that sugar into storage and reloading it is rather large in comparison with the profit margin, and that in every instance possible they take advantage of the saving and deliver the sugar directly to the consignees.

Q. Did Mr. Shannon discuss the warehousing practices of his company with respect to the sugar?

[fol. 191] A. Mr. Shannon constantly insisted that he did warehouse sugar in the sense that they would load several hundred pounds on a truck coming back particularly for inventory, but no great amount of sugar was attempted to be kept in the inventory. However, it was indicated to me that some quantity of sugar was usually in the warehouse.

Q. Was there a discussion as to the relationship between Mr. Wilcox and the Shannon business?

A. Yes, Mr. Wilcox answered my inquiry on that score. He stated that he was a broker. I believe he referred to himself as a manufacturer's representative generally, and a broker as to sugar for J. Aron and Company, and that Shannon is his distributor, that he buys the sugar and Shannon was his distributor.

Q. Mr. Whitehead, do you know approximately what it costs to operate a motor vehicle by common motor carrier?

A. I have some knowledge along that line, yes.

Q. What does it cost per mile?

A. Regular route common carriers, motor carriers, of general commodities construe that their cost of operation approximates very closely to 50 cents per mile.

Q. Do you know how many miles it is from San Antonio to Supreme, Louisiana?

A. Approximately 525.

Mr. Wolff, Jr.: Your Honor, we would like to object to [fol. 192] the answers to the last two questions and ask that they be stricken because from the answers, themselves, Mr. Whitehead has stated that they are based on hearsay and not upon his knowledge. Persons have stated to him what they were.

Exam. Mittelbronn: Objection sustained. Qualify the witness if you wish to elicit this type information.

By Mr. Guild:

Q. Do you know approximately what the costs are in operating a motor vehicle by common motor carrier? Do you know, yes or no?

A. Counsel, you have asked a question that no one could answer factually. The costs vary considerably. There is an

established basis for determining costs in arriving at rates and arriving at whether traffic is profitable or whether it isn't. Those bases are generally accepted by the industry, and in my experience with Strickland Transportation Company it was one part of my duty to be familiar with that area of knowledge.

However, so far as a factual answer is concerned I doubt that any individual in the United States could give you a cost of operation per mile for any truck that is operated.

Q. But you say that the industry then accepts approximately 50 cents per mile as a cost basis for operating their vehicles?

A. That is their point of departure.

Mr. Wolff, Jr.: We want to object to that question as [fol. 193] being leading and also hearsay.

Exam. Mittelbronn: Objection sustained. I haven't met one segment of the motor carrier industry that accepts anything in any part of the entire country which can be applied on a general basis, or even an individual basis, outside of their own.

Does counsel have any cost statistics based on recognized cost formulas for the particular area, if not the particular state within which respondent is operating?

By Mr. Guild:

Q. Mr. Whitehead, have you ever had the opportunity to supervise or compile, yourself, a statistical basis for costs of operating motor vehicles in this state?

A. I have never compiled, no sir, I have never compiled that information personally.

Q. Did Mr. Shannon represent who his principal purchasers of sugar were?

A. Yes.

Q. Who were they?

A. Mr. Shannon was very particular that the purchase and sale of sugar was not limited to the individuals or the companies listed on our Exhibit No. 1. However, he did indicate to me that they were his principal consignees or purchasers.

Mr. Guild: I believe that is all. Pass the witness.

Exam. Mittelbronn: Cross examination.

Mr. Wolff, Jr.: Yes, sir.

[fol. 194] Cross examination

By Mr. Wolff, Jr.:

Q. Mr. Whitehead, in line with the question that the Examiner asked a little while ago, do you know whether or not Mr. Shannon received a communication from the Commission about two years ago along the same line and was thence investigated or at least was inquired of him of his operation?

A. Yes, I have the files of my predecessor in office here maintained at that time, yes, I have those files.

Q. And then at that time no action was taken. Do you know whether or not, sir, do the files reflect whether or not his operation is exactly the same or was exactly the same then as it is or it was when you investigated him?

A. There was very little inquiry made into the operations of Shannon at the time. I don't believe that any of the office records or documents were checked or any determination was made. I do know that inquiry was opened up and that is all I know.

Q. I see.

Now, to clear up one point, Mr. Whitehead, this word, consignee, has been used several times. It's on that instrument that has been introduced into evidence, and it lists several names, Lawler, et cetera.

Now, when the sugar is billed out at J. Aron and Company, that is the seller in Louisiana, it's billed out by the [fol. 195] dray receipt always to Mr. Shannon?

A. Always to Mr. Shannon.

Q. So when this word, consignee is used that is the purchaser of the sugar from Shannon as per the records?

A. That is correct.

Q. I mean that is what is meant by the word, consignee?

A. That is the fact, yes.

Exam. Mittelbronn: Is the term, consignee, contained in that invoice, the billing?

Mr. Wolff, Jr.: No sir, I don't see it.  
You have them all there (indicating).

Mr. Guild: I don't believe it is.

Mr. am. Mittelbronn: Where was the term obtained to include it in this exhibit, then?

Mr. Wolff, Sr.: I think the government's attorney used

the Witness: I think Mr. Whitehead used it, to be fact-

Mr. Wolff: It's probably in error on my part.

Mr. am. Mittelbronn: Do I hear an objection?

Mr. Wolff, Jr.: We ask that that part be stricken or if left that it be left with the understanding, with Mr. Whitehead's own determination of what the word meant, that it had no particular legal significance and that the facts develop what they are.

Mr. am. Mittelbronn: All right.

By Mr. Wolff, Jr.:

Mr. Whitehead, are you familiar with the sugar business itself, or you learned something about it at least in 196] your investigation?

I have learned in these investigations that it's a very complicated, fast-moving business. That is about all. That is what I meant, the fast-moving part of it.

In other words, sugar is something that has to be turned pretty quickly or something that can happen to the sugar, either get wet or damp and consequently lose its value.

I have learned this, that sugar is a more highly perishable commodity than I had ever assumed that it is. Very particular warehousing must be supplied to properly warehouse sugar to keep it from contamination and dampness, it's a highly organized business. Now, beyond that I don't know much about the sugar market.

And have you also learned, sir, that everybody connected with the business works on a very small margin of profit? I mean 30 or 40 cents.

No, I don't know as to that.

It's possible; you just don't know?

I don't know.



Q. But when you say it's a fast-moving business you mean that it's necessary to buy it and sell it quickly if you want to stay in the business insofar as you have—

A. No, no, I don't mean that. I mean that the price fluctuations—I am led to believe that price fluctuations are quick and drastic in some instances, and if you get caught [fol. 197] with a big inventory of sugar on your hands you might lose some money.

Q. So it's—

A. And competitive sugar people come in and you have to arrange your price schedules and all to meet those things.

Mr. Wilcox very graciously gave me a pretty good run-down on it, but I mean it wasn't particularly pertinent except at the time to try to get to the bottom of this investigation.

Q. I see, sir.

In other words, sugar was different from lumber, wouldn't you say?

A. Well, I don't know as to that.

Q. Well, would you say—

A. It is as far as storage is concerned, certainly.

Q. And a good sugar man would try to keep his products moving as quickly as possible, because of the fact there could be a drastic decline in the market, it's necessary to try to sell the sugar, get it sold as quickly as possible, or there is a chance for a loss?

A. Mr. Wolff, I think that is true of any mercantile enterprise.

Q. But, of course, some things are more perishable than others?

A. I am sure that is true.

Q. Now, I would like to ask you one more question concerning your testimony, Mr. Whitehead, and that is about Mr. Wilcox.

Did I understand you correctly that you said that Mr. [fol. 198] Wilcox said that he was the one buying the sugar and Mr. Shannon was merely distributing it for him?

A. That's right. However, I can elaborate on that somewhat. I discussed the manner in which these orders are received with both these gentlemen, and I was told that Mr. Wilcox, when he is in town he takes orders for this sugar,

and at times Mr. Wilcox is out of town Mr. Shannon takes them, and Mr. Shannon takes them while Mr. Wilcox is in town. It seems like a sort of in and out proposition where either of them. However, Mr. Wilcox, as I understand it, does—is paid a brokerage fee on all of the sugar.

Q. From Aron and Company?

A. From Aron and Company, handled through Shannon.

Q. In other words—

A. At least that is his statement.

Q. If Mr. Wilcox can sell some sugar to Mr. Shannon he gets a commission off of it from Aron?

A. Oh, yes, definitely.

Q. So that would be his interest in trying to get Mr. Shannon to buy sugar; if Mr. Shannon wants to resell it, of course, that is up to him, but Mr. Wilcox gets a monetary consideration from Aron and Company for everything he sells to Shannon?

A. That is at least one interest.

Q. Do you know, in your investigation, looking through all the records, did you ever find any instance of Mr. Wilcox [fol. 199] purchasing sugar, himself, from Aron and Company and reselling it?

A. You mean without the intervention of Shannon?

Q. Well, you said that Mr. Wilcox—

A. I didn't investigate any records of Mr. Wilcox. I only investigated the records of Mr. Shannon.

Q. And they all reflected that Mr. Shannon purchases sugar from Aron and Company?

A. Yes.

Q. Did you determine whether or not Mr. Shannon in his business buys and sells other commodities, such as grain, salt, sugar, cattle?

A. I have already so testified.

Q. Molasses and others?

A. I don't know anything about molasses. I found plenty of evidence of livestock, feedstuffs and salt, which is all aligned with the feed business, of course.

Q. Did you investigate Mr. Shannon's records to determine the value of his trucking equipment as opposed to the value of other equipment in the business? In other.

words, is his whole value tied up in his trucks or is it not just a small percentage of the value of his fixed assets? .

A. From my observation, I went by the warehouse one time, and the gentleman in charge was not there so I did not invade the premises. However, I did look in the front [fol. 200] door, and there were several thousand pounds of feedstuffs stored in that warehouse.

Mr. Shannon was extremely active while I was in his office in the purchase and sale of livestock. I don't know anything about his assets.

Q. I see.

A. I am satisfied in my own mind that his general business and his primary business is that as a livestock dealer and shipper and a livestock feedstuffs dealer.

Q. But as you said you have already testified that he does buy and sell other items?

A. Oh, yes, yes, extensively, I would say.

Q. And you don't know what the relationship of his trucking equipment bears to the total value of the assets of his business?

A. Oh, no, no.

Q. Nor do you know what relationship the salaries he might pay his truckers, the ones that actually drive the trucks, bear to the total salary of the total payroll?

A. I have no knowledge of the total number of employees Mr. Shannon has. I just don't know.

Mr. Wolff, Jr.: I believe that is all, sir.

The Witness: Thank you.

Exam. Mittelbronn: Maybe the record is clear but I am not. I understand on this Exhibit No. 1, identified as [fol. 201] Exhibit No. 1, that the first item shown on page 1 thereof is supposed to be the same quantity of sugar that is shown in item 1 of page two?

Mr. Guild: Yes, sir.

The Witness: Mr. Examiner, if these sheets are laid down side by side and the invoice number 1683 on the first line of the left hand page is related to sales slip number 1262 on the second page, that single line across the two sheets constitutes a complete transaction of the purchase, transportation and sale of a single lot of sugar.

Exam. Mittelbronn: All right. Thank you.

# Redirect examination.

By Mr. Guild:

Q. Mr. Whitehead, you didn't mean to infer that, when you stated Mr. Shannon was in the business of livestock and feedstuffs, that he was not in the sugar business, transportation of sugar, did you?

A. My observations and investigation of Mr. Shannon's operations related particularly to the transportation of sugar, in which I was interested.

Q. But that was—

A. Mr. Shannon was certified by our Commission years ago as a private carrier of livestock and is so registered with our Commission at this time, and is engaged in that business at this time.

While there I determined to my own satisfaction that he is a rather extensive dealer in livestock feedstuffs and salt, [fol. 202] such commodities—

Q. That's as opposed to sugar or the transportation of sugar, the handling of sugar?

Mr. Wolff, Sr.: Now, that is certainly leading, Mr. Examiner, and another thing—

Exam. Mittelbronn: Objection sustained. Proceed. Make the questions more specific and direct without leading, counsel.

Mr. Guild: That is all.

Mr. Wolff, Jr.: One more thing, Mr. Whitehead.

Exam. Mittelbronn: Further cross.

# Recross examination.

By Mr. Wolff, Jr.:

Q. At the time that you were there didn't Mr. Shannon have on hand about five hundred sacks of sugar, more than a carload, in his inventory?

A. Mr. Wolff, I never could pin that down. I asked Mr. Shannon's permission to see his warehouse, and I went over there and the warehouseman was not there. I don't know. I never saw sugar in the warehouse personally so I

don't know. I had to get some information from Mr. Shannon as to what sort of an inventory was carried, and the most information I could elicit was the fact that they sold from one to twenty-five bags to small customers at a time.

Q. Didn't Mr. Shannon show you the records of the inventory that he had on hand, show you a receipt for so many bags, five hundred bags, approximately?

[fol. 203] A. There was one instance wherein sugar was warehoused, and I think my memory may be wrong as to the name of the warehouse, I think it was the Security Bonded Warehouse, where I believe an entire truckload of sugar was warehoused.

Q. Did at that time, didn't you all have a discussion along this line, that he had run out of space in his own warehouse to even store the sugar, and he had to put some of this sugar some place else?

A. The discussion followed this trend: The truckload of sugar was stored in this public warehouse and I think it was Security Bonded. The cost of the storage was 12 cents a hundred pounds. Now, Mr. Shannon told me that with his small margin in the sugar transactions that he simply couldn't afford commercial storage space, and that he represented to me never occurred between the time that was stored and the time of my investigation. There was one truckload stored in Security Bonded Warehouse to my knowledge.

Q. He told you he couldn't afford to make any profit on it by doing that and he would have to try to find space in his place or try to get it sold fast?

A. Well, he told me he couldn't afford to get it stored in commercial storage because of that.

Mr. Wolf, Jr.: That is all.

Mr. Guild: I would like to show in the record the rail and motor carrier rates by making a statement in the record [fol. 204] from Exhibits 2 and 3 at this time, if I may.

Exam. Mittelbronn: Well, Exhibits 2 and 3 are already in the record.

Mr. Guild: Yes, I would just like to put it in the transcript, recite out from the Exhibits what the actual rates are by rail and by motor carrier.



Exam. Mittelbronn: Proceed.

Just a moment. Finished with this witness, everyone?

Mr. Wolff, Jr.: Yes.

Exam. Mittelbronn: Thank you, Mr. Whitehead. You are excused.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Guild: From Exhibit 2 showing the rail rates in carload lots from Supreme to San Antonio, they are 69 cents per hundred pounds. In less than carload lots \$1.38 per hundred pounds.

From Exhibit 3 the motor carrier rates, the transportation of sugar from Supreme to San Antonio in less than truckload lots is \$1.70 per hundred pounds and the rate in truckload lots is \$1.09 per hundred pounds.

May I go off the record for a moment?

Exam. Mittelbronn: Off the record.

(Discussion off the record.)

Exam. Mittelbronn: On the record.

[fol. 205] Mr. Guild: I wanted to state for the record that respondent, E. and R. Shannon, is a partnership composed of Emma Shannon and Richard J. Shannon, and respondent, J. T. Wilcox, is an individual doing business as Wilcox Brokerage Company.

May I have just a moment?

Exam. Mittelbronn: Partnership formed under the state laws of Texas?

Mr. Wolff, Sr.: Yes, sir.

Mr. Wolff, Jr.: Yes, sir.

Mr. Guild: We rest.

Exam. Mittelbronn: You have completed your case?

Mr. Guild: Yes, sir.

Exam. Mittelbronn: Five minute recess.

(Short recess.)

Exam. Mittelbronn: Respondents ready to proceed?

Mr. Wolff, Jr.: Yes, sir.

Mrs. Masar, will you come over here and take the stand, please?

MARTHA MASAR was sworn and testified as follows:

Direct examination.

By Mr. Wolff, Jr.:

Q. Will you state your name, please?

A. Martha Masar.

Q. Where do you live?

A. Number 2 Pearl Court.

[fol. 206] Q. Here in San Antonio?

A. San Antonio.

Q. What is your business or profession?

A. Bookkeeper.

Q. For whom do you work?

A. For E. and R. Shannon.

Q. How long have you been working for Shannon?

A. Be nine years this June.

Q. Are you familiar, then, with the books and records of the organization?

A. Yes sir, I would say that I am.

Q. Are you familiar with the sugar phase of the business of E. and R. Shannon?

A. Well, in the way of bookkeeping, yes sir.

Q. Do you know anything about any inventories of sugar?

A. Yes, sir.

Mr. Wolff, Jr.: Should we mark these for identification so they can be used by her to refresh her memory?

Exam. Mittelbronn: Perfectly all right. Are they going to be submitted?

Mr. Wolff, Jr.: I don't know whether we want to or not. We could submit them but they would burden the record because the sugar part of it is just part of the inventory as a whole. They are all attached.

Exam. Mittelbronn: Well, you can describe—

[fol. 207] Mr. Wolff, Sr.: They are the records kept by the witness.

Exam. Mittelbronn: Yes.

Mr. Wolff, Sr.: Prepared by the witness.

Exam. Mittelbronn: You can hand her the document or set of documents one at a time, as you wish, and in hand-

ing them to her describe it as such and such a record, certain date, and from that she can testify.

Mr. Wolff, Jr.: All right.

By Mr. Wolff, Jr.:

Q. Mrs. Masar, I show you an instrument purporting to be an inventory taken on the 30th of November 1956 entitled at the top West Compress and Company, and ask whether or not you have ever seen that instrument before?

A. Yes sir, I have.

Q. Was that instrument prepared under your authority?

A. Yes, sir.

Q. Would you look through it and see if there is anything on it concerning sugar?

A. Yes sir, there is a sugar inventory showed that I figured.

Q. What does the inventory show?

A. A hundred bags on hand.

Q. Now, I show you other instruments, 31st of December 1956, 31st of January 1957, the 28th of February 1957, and all of them purport to be inventories of the E. and R. Shannon; and ask whether or not on each of those instruments do you see anything concerning sugar? First, were [fol. 208] all those instruments prepared under your supervision and direction?

A. Yes, sir.

This one shows one hundred twenty-three bags which—

Mr. Guild: Would you relate that date?

Exam. Mittelbronn: What is the date of the inventory on that?

The Witness: December 31, 1956.

Exam. Mittelbronn: One hundred fifty-three bags?

Mr. Guild: One hundred twenty-three?

The Witness: One hundred twenty-three. Would you like the money also?

By Mr. Wolff, Jr.:

Q. What is the next one that you have there?

A. January 31, 1957.

Q. What was that inventory? Does it show anything about sugar?

A. Yes sir, that shows 209 bags.

Q. Do you have any other records before you that would show anything about sugar on any other date?

A. On February 28.

Q. What does that show concerning sugar, if anything?

A. That shows 517.

Q. Now, how often at present do you take an inventory of sugar at E. and R. Shannon?

A. At the end of each month.

[fol. 209] Q. Prior to November of 1956 how often did you take an inventory of sugar?

A. Once every, I think it was four months, six months, something.

Q. Do you remember the occasion when Mr. Whitehead came to the place to investigate for the Interstate Commerce Commission?

A. Yes sir, I do.

Q. At that time are you familiar with the inventory of sugar that you had on hand at that time?

A. Yes, sir. I don't know the exact number but I do know approximately.

Q. You know approximately how much was on hand at that time. Had shortly prior thereto there had been an inventory taken of sugar?

A. That I don't recall. I don't know the exact days.

Q. How do you know approximately how much sugar that you had on hand at that time?

A. Off the records. I had a storage record at that time in a bonded warehouse and then some on hand.

Q. You had some in a warehouse?

A. Yes, sir.

Q. And also some on hand at your own warehouse, Shannon's warehouse?

A. That's right.

Q. All right.

[fol. 210] Q. What was that figure, how much sugar was on hand at that time?

A. To the best of my knowledge it was 400 and something.

Q. Something over 400 bags of sugar?

A. I don't know for sure, sir.

Q. Do you know why there was some sugar stored at a bonded warehouse?

A. Yes, sir.

Q. Will you tell us, please ma'am?

A. Well, at that time Mr. Shannon didn't have it sold and he had to store it, the way I understood it.

Q. Did you have enough room to store it at your own place?

A. No, sir. I mean, I say I don't think we did. That would be my understanding.

Q. Now, you testified awhile ago, I believe, that you are familiar with the sugar business insofar as your records, your bookkeeping, takes you?

A. That's right.

Q. Does Mr. Shannon, from your knowledge of the records, and your knowledge of his operation of the business, does Mr. Shannon sell sugar to the purchasers that were listed on that exhibit and to others for cash or does he sell on credit?

A. Credit and some cash in some instances.

Q. What would the percentage of cash sales bear in relationship to the credit sales? Would it be about the same [fol. 211] or would it be smaller?

A. Oh, the cash sales would be very small. It's nearly all credit.

Q. I show you some instruments purporting to be what you call—what would you call these, ledger sheets?

A. Ledger sheets.

Q. Ledger sheets, with the name of various persons at the top of same, and I ask you whether or not you have ever seen these instruments before?

A. Yes sir, I have. I did all the posting on them.

Q. Were those instruments prepared under your supervision and control?

A. Yes, sir.

Q. What are those instruments?

A. Well, those are sales that we sold to these customers on credit that I keep a record of, accounts receivable, I would say.



Q. Receivable records?

A. That's what I call them, accounts receivable.

Q. Would you tell us what accounts you have there?

A. The Barq's Bottling Company, Judson's Candy Company, Knowlton's Creamery, H. T. Lawler and Sons. That's all that is here, but there's many others in the current ledger.

Q. You are pointing to a book?

A. These are dead files. I mean filled up sheets.

[fol. 212] Q. I show you another instrument purporting to be a book that has quite a few sheets inside of it, appearing to be similar to the ones that you just testified to, and ask whether or not you have ever seen that instrument or that book before?

A. Yes, sir.

Q. Was that book prepared under your supervision and control?

A. Yes sir, by me.

Q. Would you tell us just what that instrument and that book is?

A. That is my accounts receivable ledger.

Q. Do you have a section in there for sugar purchases?

A. It's for sugar, feedstuffs, salt and all things. It's Barq's Bottling Company, Bohnet's Bakery, Casso Guerra, and then S. Cantu and Sons, and Coca Cola Bottling Company, Colonial Cake Company, Delaware Punch Company, Pete Hodge, Jersey Land Creamery, Judson's Candy Company, Knowlton's Creamery, H. T. Lawler, Sylvester Lenz, W. H. Matthews Company, Metzger's Dairy, James Moore and Company, Polar Ice Cream Company, Pepsi-Cola Bottling Company, Roegelien Provision Company, Royal Crown Bottling Company, Sanchez Candy Company, and Ferd Staffel's, and the State Board of Controls, Purchasing Division, at Austin, Texas.

Exam. Mittelbronn: It's understood that all of those firms or names you have read are located within Texas?

Mr. Wolff, Sr.: All within San Antonio.

[fol. 213] Exam. Mittelbronn: Within San Antonio?

Mr. Wolff, Jr.: Except the one in Austin, I believe.

The Witness: Austin.

Mr. Wolff, Jr.: And there was one in Laredo.

The Witness: Laredo.

Exam. Mittelbronn: They are all in the State of Texas?

The Witness: State of Texas, yes.

By Mr. Wolff, Jr.:

Q. Now, what terms, if any, does Mr. Shannon have for collection of those credit accounts? Does he have any credit terms that he requires payment by a certain time?

A. Yes sir, we try, you know, within ten days, there's a two per cent discount if they pay within ten days.

Q. I see.

Are the goods turned over to them, to those particular persons you named, or companies that you named, without their having to pay the money when the goods are turned over?

A. Yes sir, it's all on credit, all of these are.

Q. Now, I notice—

A. These are not cash sales. These are credit.

Q. All credit sales.

I noticed you said those were dead instruments that you have on the top that you testified to to start with, not in the book, but that you now are thumbing through.

Do you mean that those are some other year?

[fol. 214] A. Full, filled up sheets is what I meant.

Q. Filled up sheets.

Now, what dates do those begin of the filled up sheets? Are they the days prior to May and June of 1956?

A. Oh, yes sir, yes sir. They could go back—well, I would have to look to be sure, but they would be a few years back. Back, I guess, as far as '54.

Q. In other words, this selling on credit is something that's been going over the last two or three years, at least, insofar as those records show and insofar as you remember?

A. Yes, sir.

Q. Do you know, could you tell us how much money you now have in your accounts receivable as being owed by various debtors?

A. Yes, sir.

Q. In San Antonio and those other two that were named in Austin and Laredo for sugar only.

A. Sugar only? Right now it's \$10,022.10.

Q. In other words, that is what is owed to Mr. Shannon for credit sales of sugar right now?

A. That's correct.

Q. Back in 1956 was Mr. Shannon still selling on credit?

A. Yes, sir.

Q. Do you remember whether or not he's ever had more money than that tied up in sugar sales?

[fol. 215] A. Oh, yes sir, there was more than that.

Q. Can you give us an approximation or tell us how much and approximately what time in 1956?

A. Well, I do know that at times there has been 20 and 30 thousand.

Q. Are you familiar with what happens in the event that something happens to the sugar either in the warehouse or while Mr. Shannon is bringing it from Louisiana, as to who takes the loss on it?

A. Mr. Shannon does.

Q. Has that happened?

~~A. Yes, sir.~~

Q. What do you do with your books when that happens?

A. Well, Mr. Shannon takes the loss. I mean all he can sell is what is left, if it breaks or if it should happen to get down.

Q. Are you familiar with the balance sheet of the company, the E. and R. Shannon Company?

A. Yes sir, to some extent I am.

Q. Do you know what various accounts there are contained in the balance sheet?

A. Yes, sir.

Q. As asset accounts?

A. Yes, sir.

Q. I show you an instrument purporting to be a balance [fol. 216] sheet of E. and R. Shannon, dated the 31st of December 1956, and ask whether or not you have ever seen that instrument before?

A. Yes, sir.

Q. Was that instrument, the accounts on that, taken from the records that are under your supervision and control?

A. Yes, sir.

I notice there is attached to it something that is put here by scotch tape, a breakdown of the fixed assets accounts. Will you explain to us why that was put on there?

Well, you asked me for the assets—

Sam. Mittelbronn: Off the record.

(Discussion off the record.)

Sam. Mittelbronn: On the record.  
Proceed, please.

By Mr. Wolff, Jr.:

Now, that instrument that you have in your hand, we are discussing that balance sheet that you have in your hand, and you were explaining why we added a detail of fixed assets. Would you—

Well, you asked me for the fixed assets, and I just did this little sheet and put it up here.

I see. In other words, I asked you—

Because that is a breakdown of the assets.

Sam. Mittelbronn: One at a time, please.

Mr. Wolff, Jr.: Excuse me.

By Mr. Wolff, Jr.:

The only thing we were interested in for the purposes of this hearing was the fixed assets, so you added to the total balance sheet, but have brought the total balance sheet to give a complete picture of the accounts?

Yes, sir.

Now, what is the fixed assets account, what comprises

The automobiles.

What is the value of the automobiles?

Would you like the book value at this time?

Well, read the book value and the depreciation and the total value. I mean the cost, whatever—do you use a cost reserve?

Cost and depreciation reserve and then my book value.

Book value is all right.

Automobiles, \$4,597.01.

Q. Now, are those automobiles used in transporting any commodities?

Mr. Guild: May I have that figure over again, please?

The Witness: \$4,597.01.

By Mr. Wolff, Jr.:

Q. And, now, are those automobiles? Those aren't trucks?

A. No, sir.

Q. They are not used to transport any commodities insofar as you know?

A. No, sir.

Q. All right.

[fol. 218] What is the next one?

A. Trucks.

Exam. Mittelbronn: Excuse me. How many automobiles does that represent?

The Witness: That represents four, I would say.

Exam. Mittelbronn: Proceed.

The Witness: Three or four. Three, that's right, three.

By Mr. Wolff, Jr.:

Q. What is the next item?

A. Trucks.

Q. What is the book value of the trucks?

A. \$14,176.50.

Q. What is the next item?

A. Office furniture and fixtures.

Q. How much, what is the book value of that?

A. \$926.70.

Q. What is the next item?

A. Buildings.

Q. What is the value of that?

A. \$9,896.82.

Q. What is the next item?

A. The equipment, mill equipment.

Q. And what is the value of that?

A. That's—excuse me, what figure did I give you, the nine thousand?



Mr. Wolff, Sr.: Yes.

[fol. 219] Exam. Mittelbronn: Yes.

The Witness: That's the mill equipment, I am sorry.

Mr. Wolff, Sr.: And not buildings?

The Witness: And not buildings.

That is the mill equipment figure.

By Mr. Wolff, Jr.:

Q. What is the figure on the buildings?

A. \$26,944.49.

Q. Any other assets on there, fixed assets?

A. Yes sir, there is another equipment figure, which is \$954.24.

Q. Any other assets?

Exam. Mittelbronn: What does that figure represent?

The Witness: That's also mill equipment.

Exam. Mittelbronn: Mill equipment?

The Witness: Yes, sir.

By Mr. Wolff, Jr.:

Q. Any other fixed assets?

A. Yes sir, there is a cottage figure, which is \$1,854.50.

Q. Cottage?

A. Yes, sir.

Q. What is that?

A. That was taken in on a bad debt.

Q. I see.

Any other assets, fixed assets?

A. That is all.

Q. What is the total value now of the fixed assets?

[fol. 220] A. \$59,350.26.

Q. Now, how about the current assets, does that balance sheet break down the values of all the inventories?

A. Well, yes, uh-huh, it is a small breakdown.

Q. All right.

Now, what does that show as to the current assets pertaining to inventories, themselves?

A. Well, there was an accounts receivable.

Q. What does the accounts receivable show?

A. \$30,277.79.

Q. And I believe you testified earlier of that about ten thousand more or less is sugar, is that correct?

A. Correct.

Q. And I think your ten thousand figure, was that as of now or as of the 31st of December, '56?

A. No, the ten thousand figure was as of now, but I think I can give you that figure as of then.

Q. Well, rather than burden the record is it approximately the same then as it is now, two months ago?

A. I would say in that neighborhood. It could vary.

Q. I see.

Now, how about the total amount of inventory that was on hand, assets of the company?

A. Well, I have it here in two figures.

Q. All right. Give us both figures.

[fol. 221] A. The livestock figure was \$3,451.70.

Q. All right.

A. And the other figure of feedstuffs and sacks was \$15,339.60. And then the other was \$2,675.20.

Now, that included the sugar.

Mr. Guild: What was that figure again?

The Witness: \$2,675.20.

By Mr. Wolff, Jr.:

Q. Now, what is the total current assets?

A. \$56,459.91.

Q. And of that you say about 30 thousand is accounts receivable, so you have about 26 thousand dollars in actual material, current assets?

A. And cash in the banks.

Q. And cash?

A. Uh-huh.

Q. What is or what figure do you have on cash in the bank there?

A. \$4,180.62, and the cash on hand was \$535.00.

Q. Now, so that exclusive of accounts receivable you have—did you say there was about \$56,000.00 in fixed assets, or 59,000 and something?

A. \$59,350.26.

Q. And—

A. There's prepaid expenses also.

Q. And then that would be added to the current assets [fol. 222] figure less the amount of your accounts receivable to get what actual material assets the company had, that, is that right?

A. Come again.

Q. I said you would take the total assets of the company and subtract the accounts receivable and that figure would leave you what the actual material assets the company had?

A. Correct.

Q. Now, that balance sheet is taken as of the 31st of December 1956. From your knowledge of the business would you say that the asset accounts remained fairly constant during the year 1956?

A. Yes, sir.

Q. Would the difference be fluctuation value of the inventory?

A. The inventory and the accounts receivable.

Q. And the depreciation?

A. Yes, sir.

Q. At the end of the year you would take more depreciation so actually at the start of the year your accounts would be valued, your assets would be valued a little more?

A. More, yes.

Q. Now, are those same accounts reasonably constant since the 31st of December up to the present date, the last of March?

A. I would say so.

Q. Are you familiar with the salaries that are paid the [fol. 223] various employees of E. and R. Shannon?

A. Yes, sir.

Q. Can you tell us how much per week the total payroll amounts to?

A. Per week?

Q. Yes.

A. Oh, it would have to be an estimate figure of around \$1,100.00 a week.

Q. I see.

Does Mr. Shannon employ people who drive trucks?

A. Yes, sir.

Q. How many truck drivers?

A. Three.

Q. How much are they paid?

A. Three, I will say—well, in all I think there's five truck drivers. There would be five or six in all. Some of them are—we have different truck drivers for the big trucks and small trucks, I would say.

Q. All right.

What would be the total amount they are paid each week, the truck drivers, themselves, that actually haul, or that ride the big trucks, drive the big trucks, that carry the sugar and grain and livestock, whatever it is?

A. Well, it varies, but I would say an average would be about, oh, \$240.00.

[fol. 224] Q. Out of the \$1,100.00, those are paid to drivers of trucks?

A. That's right.

Mr. Wolff, Jr.: I believe that is all. Thank you.

Exam. Mittelbronn: Cross examination.

Mr. Guild: I would like to cross-examine you.

The Witness: Oh.

Cross examination.

By Mr. Guild:

Q. What credit terms does Mr. Shannon have with J. Aron and Company? What are his credit terms?

A. In what respect do you mean, sir?

Q. In the purchase of sugar.

A. Well, they sell to us and, of course, we pay them. We try to pay them, you know, within ten days.

Q. You have a within ten days clause?

A. Well, no, we have no clause.

Q. Well, I say it's within ten days to get the discount?

A. To get the two per cent discount, that's right.

Q. And that is the same credit arrangement you have with your purchasers of sugar, is that correct?

A. Correct.

Q. May I see your balance sheet a moment?

I notice on this balance sheet of 12-31-56 you have accounts payable, \$13,322.79. Is a large portion of that accounts payable to J. Aron and Company?

A. Yes, sir.

[fol. 225] Q. So that actually the accounts payable to J. Aron and Company and the accounts receivable from your purchasers of sugar will more or less be representative, will they not? In other words, if you buy more sugar for the sale to customers, and they have to thereafter pay you within ten days you will have a counterbalance of accounts payable to J. Aron and Company, likewise, is that not correct?

A. No, it varies quite a bit at times.

Q. Well, would you say, for instance, say Mr. Shannon suddenly sold \$20,000.00 worth of sugar to Barq's, and he ordered that from J. Aron and Company, and he allows Barq's to pay within ten days, is that correct, for the two per cent discount?

A. That's right.

Q. And he also gets a two per cent discount from J. Aron and Company if he pays within ten days. That large purchase would be reflected in both the accounts payable and in the accounts receivable, would it not?

A. Well, I don't quite understand. I mean—

Q. Well, you understand that having sold the sugar, \$20,000.00 worth, to Barq's, it would be on the accounts receivable, \$20,000.00 from Barq's.

A. That's right.

Q. And having purchased the sugar on a payment of two per cent discount within ten days from J. Aron and Company, the \$20,000.00 worth of purchases from J. Aron and [fol. 226] Company would also show on the accounts payable, would it not?

A. That's right.

Exam. Mittelbronn: Do you have any idea of the \$13,322.79 which counsel has read to be the total of your accounts payable as of December 31, '56, approximately what portion of that is represented in accounts payable to J. Aron and Company?

The Witness: You mean—well, in my memory I do not know the figures. I mean exactly.



Exam. Mittelbronn: Approximately do you know within a thousand dollars, if you can.

The Witness: Well, I would say approximately it was about five thousand at that date.

Exam. Mittelbronn: Thank you. Proceed, counsel.

By Mr. Guild:

Q. You are not certain of that, though?

A. I am not certain of it.

Q. And, of course, you wouldn't owe J. Aron and Company as much as Barq's would owe you because you sell it at a higher price, is that correct?

A. That's correct.

Q. In your inventory of sugar if sugar is on the truck and you have purchased the sugar at Supreme, Louisiana, and that sugar is on the truck, you keep that sugar in your inventory until you sell it, is that correct?

A. That's correct.

Q. So sugar in your inventory would include any sugar [fol. 227] in your truck?

A. That's right.

Q. And it does sometimes include sugar in your trucks?

A. Well, it just depends on the date of the purchases when I close out my books.

Q. If on the date of the purchase you have sugar on the truck it would be part of the inventory?

A. That's right.

Q. Now, I have your inventory on 2-28-57. You stated that you had an inventory on that date of 517 bags. What does this 320 bottlers indicate?

Exam. Mittelbronn: 320 what?

By Mr. Guild:

Q. Bags, and it shows to be to bottlers. Would that be to Barq's?

A. No sir, I wouldn't know who that would be to.

Q. That is your handwriting, is it not?

A. Yes sir, but I would say that that was a load of sugar that was, you know, that I had.

Q. That had been on the truck?

A. That was on the truck that was coming in, that was purchased, that I would handle through my books as February, closing out, February 28.

Q. And the bottlers would indicate that you knew who you were going to sell that sugar to, is that right?

A. No, that was the type of sugar.

[fol. 228] Q. I see.

How many square feet would you say are in Shannon's warehouse?

A. I couldn't answer that.

Q. But the majority of the items stored in the warehouse are feedstuffs and items of that sort other than, say, sugar? The sugar would be a small portion, of any sugar that you did store, say a hundred bags?

A. Not always.

Q. Well, let's say a hundred bags. How much space would a hundred bags take up?

Exam. Mittelbronn: If you know.

By Mr. Guild:

Q. If you know.

Exam. Mittelbronn: The lady is qualified as a book-keeper.

A. I do not know the storage capacity.

By Mr. Guild:

Q. Well, but you have observed the storage of sugar in Mr.—

Exam. Mittelbronn: The question is answered, counsel. She does not know.

By Mr. Guild:

Q. Now, on the balance sheet you show that as current assets an inventory of \$2,675.20, which you said includes sugar. What portion of that amount represents the actual sugar, do you know?

A. Offhand I don't know. I would have to look on the inventory sheet to tell.

[fol. 229]. Q. But what are the items that that would include in your inventory, in that item? You have inventory miscellaneous. What other items would that include?

A. That could include the gas pump, the gasoline on hand, and, well, it shows on the schedule there. I don't know exactly. I mean I couldn't tell you the exact figure.

Exam. Mittelbronn: Probably postage stamps and office stationery, paper clips.

The Witness: Just different things.

Exam. Mittelbronn: Everything else.

By Mr. Guild:

Q. Now, you show sugar, 123 bags on December 31, 1956, at \$9.05 would equal \$1,113.15. That would be the inventory of the sugar?

A. That's right.

Q. Have you inventoried that at your cost or at the price that you would sell it?

A. At cost.

Q. You paid \$9.05 for that 123 bags of sugar?

A. I wouldn't state to that effect. I don't remember.

Q. Well, you have been handling the purchases of sugar across the bookkeeping—

A. It varies.

Q. What would be the average cost of a hundred pound bag of sugar to E. and R. Shannon?

A. Now, where do you mean?

[fol. 230]. Q. Approximately the average of a hundred pound bag of sugar.

A. From J. Aron and Company?

Q. From J. Aron and Company, that you would pay J. Aron.

A. I would say about \$8.50, \$8.55. It varies, so I wouldn't want to state—

Q. It very seldom goes above \$8.50 or \$8.55, does it?

A. Well, it fluctuates. I wouldn't say whether it does or doesn't.

Q. Now, the most expensive type of sugar is called Supreme, isn't it?

A. Supreme.

Q. Then there is Himalaya, which is the least costly sugar?

A. That's right.

Q. Now, what would a hundred pound bag of Supreme sugar cost E. and R. Shannon today?

A. I would say it would be about \$8.55. I don't really know. I am not a purchaser. I just keep the books.

Q. But you are familiar with the operation, after nine years, you would know the cost of sugar to E. and R. Shannon.

Exam. Mittelbronn: She's answered to the best of her knowledge the price would be \$8.55.

Mr. Guild: All right.

By Mr. Guild:

Q. You put the price \$9.05 there?

A. Well, that would be—we would, you know, at that date, we would figure that would be the cost of sugar.

[fol. 231] Q. Oh, you figured that would be the cost of it but that didn't come from your—

A. That would be our—

Q. Did that come from your invoice of J. Aron and Company to E. and R. Shannon?

A. No, sir.

Q. It did not?

A. No, sir.

Exam. Mittelbronn: What then is the source of this price figure of \$9.05 if it's not obtained from the J. Aron invoice?

The Witness: That is the figure that we inventoried at.

Exam. Mittelbronn: I see.

The Witness: Just as we inventory our feed or livestock.

Exam. Mittelbronn: I see. Inventory value.

The Witness: Inventory value.

By Mr. Guild:

Q. But you generally inventory at cost, do you not? That is for income tax purposes.

A. Where it's been handled, unloaded and put in the warehouse, just like any feedstuff is.

Q. I see.

What is the usual payment period to J. Aron and Company by E. and R. Shannon for the sugar, within how many days?

A. Usually within ten days. It's sometimes beforehand. Sometimes a little longer.

Q. There are many instances where it runs longer than [fol. 232] ten days, are there not?

A. No, sir.

Q. There are not many instances?

A. No, sir.

Q. Usually within ten days?

A. That's right.

Q. All right.

Now, the trucks which are itemized on your balance sheet at \$14,176.50, they are used in the transportation of feed and livestock as well as sugar, are they not?

A. Not all the trucks.

Q. Not all the trucks? What other are the trucks used for? You have three trucks. How many trucks are used for the transportation of livestock and feedstuff?

A. Well, I mean they are all—what I was trying to say is all the trucks don't go to Louisiana.

Q. No.

A. And farther off. But they are all used in all the business.

Q. So that most of the time they would be used in the transportation of, say, livestock, feedstuff or salt, items like that, they are used in the transportation of those items for E. and R. Shannon, are they not?

A. All of the trucks, yes, but what I mean, they are not all gone great distances is what I meant, what I said the [fol. 233] first time.

Q. Well, how many trucks are there?

A. There's seven, I believe.

Q. Seven of them.

And how many are used for long distance hauling?

A. Well, what do you say by long distance hauling?

Q. How many go to Louisiana, we will say, transport livestock up to Louisiana? How many would be used for that?

A. Three.



[fol. 234] By Mr. Guild:

Q. Three. There are three really long distance hauling trucks, then?

A. That's right.

Q. And they are used in the transportation of live stock, feed stuffs and salt going toward Louisiana any great distance away from San Antonio?

A. Well, wherever Mr. Shannon has a customer that wants the product.

Q. But I say those items, and then on the backhaul they may or may not have sugar on them, is that correct?

A. Well, they may have sugar. They may have feed or whatever he buys.

Q. So that normally since the truck always goes out without sugar and only occasionally comes back with sugar, they are primarily used for transportation other than for sugar, is that correct?

A. Whatever he purchases is what they are used for.

Q. Whatever other than sugar?

A. That's right.

Q. What is mill equipment?

A. That is the grinders, to my knowledge, and any equipment—

Q. That's wholly unconnected with the sugar, isn't it?

Exam. Mittelbronn: Let the witness finish before you ask her a new question. Proceed.

A. It would be the different mill equipment which would [fol. 235] be the grinders and sackers, where they sew up sacks, to my knowledge. I mean I am not a mill hand. I am a bookkeeper. I don't know just what—all I see is—

By Mr. Guild:

Q. Well, would they be used in connection with the sugar, handling of sugar?

A. I couldn't answer that question.

Q. What are the drivers' salaries? What do they get paid?

A. Well, they will average around \$80.00 a week.

Q. They will average around \$80.00 a week and how many drivers would you average, that are in use in a week?

A. Five.

Q. Five.

So eighty times five would be about four hundred.

A. Now, when I say drivers, I don't know just what you are—

Exam. Mittelbronn: There are two types of drivers.

Mr. Guild: Well, she said drivers and five drivers, and I am referring to those drivers.

Exam. Mittelbronn: The witness will explain her answer. Proceed.

A. Well, I mean, see, we have, as I said, seven trucks. What drivers are you referring to?

By Mr. Guild:

Q. Well, do you have five drivers that you use on an average every week? That was your statement, is that correct?

A. Well, there's—I don't know just which drivers you are [fol. 236] referring to. There could be sometimes seven boys driving, but I mean there are seven trucks.

Q. But you said on an average five drivers are used every week, is that correct?

A. Not on the big trucks, no, sir, there's three.

Q. There's three drivers on the big trucks?

A. That's right.

Q. When you stated that the drivers, and you said five drivers, would average \$240.00 out of the total payroll—

A. Not the five drivers, no.

Q. —then you meant that they were the three drivers that were—

A. That's right.

Q. —that were employed.

And the payroll also includes drivers that are not connected with the long distance hauling, is that correct?

A. In my over-all payroll.

Q. Yes.

There are other drivers. Only three are connected with the long distance hauling?

A. That's right.

Q. And what else would the payroll include, your salary, for one?

A. My salary and the order buyer.

Q. I beg your pardon?

A. My salary, the feed mill hands and fellows that unload [fol. 237] the sugar, and drivers, order buyer, live stock order buyer.

Q. Would you say the majority of that salary is expended for the handling and for the transportation of items other than sugar?

A. No, sir.

Q. You would not.

Then you would say, salaries, total payroll, would be expended, that is, a greater portion of that salary would be expended for the handling of the sugar and transportation of same as compared to the other items handled by Mr. Shannon?

A. I don't quite get you, what you are trying to ask me.

Q. Well, you said you had a total payroll, weekly average, of about \$1,100.00.

A. That's right.

Q. And I asked you what portion of that, would it be greater or smaller, was expended for the handling and transportation of the sugar, or would it be greater for the handling and transportation of items other than sugar.

A. Well, that would vary also, I mean, you know, if he was buying a lot of feed at that time and cattle it could be more. It could be less. I just never figured an average on it.

Mr. Guild: Mr. Examiner, may I see the balance sheet?

Exam. Mittelbronn: Yes.

By Mr. Guild:

Q. Now, what would these notes payable, what do they represent?

[fol. 238] A. The notes payable?

Q. Yes, you have an item here of \$11,000.00.

A. That would be to the bank.

Q. To the bank?

A. Yes, sir. Could be an equipment note in there, I think.

Q. All right.

What is the accrued expenses? Would that be like insurance, items of that sort?

A. Yes, social security taxes, workmen's compensation, insurance, and anything pertaining to expenses.

Q. How much losses has Mr. Shannon incurred in sugar over 1956?

A. Well, I couldn't tell you. I mean I don't really know the amount.

Exam. Mittelbronn: Losses of what nature, counsel?

Mr. Guild: Well, the witness testified that, I assume, if a sugar bag broke up, why, that sugar would be lost while it was on Mr. Shannon's truck.

The Witness: That's right.

Mr. Guild: Or in his warehouse, and that loss would be his.

The Witness: That's right.

By Mr. Guild:

Q. Losses of that similar nature, you don't know how much he's incurred in that type of loss?

A. Well, it would maybe be sold at a reduced price.

Q. Would that type of loss be reflected in your balance [fol. 239] sheet as a loss?

A. No, sir, it's in the purchasing and selling.

Q. You put it in the purchases and sales?

A. That's right.

Q. And you don't know how much losses? Were there great amounts of losses, that sort?

A. I couldn't tell you any amount. I know that there has been losses.

Q. How did they occur?

A. Well, sometimes in the way—in handling it, and then also in storage he's had losses occur.

Q. Do you have any sugar that is in a bonded warehouse now?

A. At this time?

Q. Yes.

A. Not that I know of.

Mr. Guild: That is all.

Mr. Wolff, Jr.: That is all. Thank you.

Exam. Mittelbronn: No redirect?

Mr. Wolff, Jr.: No, sir.

Exam. Mittelbronn: Thank you, Mrs. Masar, very much.

(Witness excused.)

Exam. Mittelbronn: Off the record.

(Discussion off the record.)

Exam. Mittelbronn: On the record.

Mr. Wolff, Jr.: I would like to call Mr. Wilcox, please.

[fol. 240] J. T. WILCOX was sworn and testified as follows:

Direct examination.

By Mr. Wolff, Jr.:

Q. Will you state your name, please, sir?

A. J. T. Wilcox.

Q. Where do you live, Mr. Wilcox?

A. 136 Shadwell Drive.

Q. Is that here in San Antonio?

A. Yes, sir.

Q. What business or profession are you in?

A. I am in the brokerage business.

Q. What kind of items do you handle as a broker?

A. I handle sugar, salt, dressing and canned soup, fish and oysters.

Q. You are a defendant or respondent, I believe, in this case, isn't that right?

A. That's right.

Q. Do you know Mr. Shannon and the other respondent?

A. Yes, sir.

Q. Would you tell us just in your own words what your dealings are with Mr. Shannon insofar as sugar is concerned?

A. Well, I sell Mr. Shannon sugar FOB Louisiana.

Q. What company do you sell through in Louisiana?

A. J. Aron & Company.



Q. Does J. Aron & Company pay you a commission on [fol. 241] your sales to Shannon?

A. That's right.

Q. Do you have any other interest in Mr. Shannon's operation other than receiving a commission from Aron?

A. That is all.

Q. If Mr. Shannon sells the sugar to Barq's or whatever names that were listed previously as the purchasers of sugar from him, do you receive a commission of any sort on those sales?

A. None whatever.

Q. Then your only profit, the more sugar he sells the more you make because you sell him the sugar from Aron & Company?

A. That's right.

Q. If somebody doesn't pay their account to Mr. Shannon on the sales to Barq's or Lawler or somebody, do you share in that loss in any way?

A. None whatever.

Q. Are you familiar, sir, with the operation of the sugar business, the actual mechanics of storing it and hauling it and things such as that?

A. No, that is not my business. I don't know anything about that.

Q. I see.

Are you familiar with the margin of profit in the sugar business?

A. Yes, sir.

[fol. 242] Q. Are you familiar with that margin of profit here in San Antonio on this date, the 29th of March?

A. Yes, sir.

Q. What in your opinion would be the reasonable, normal return per hundred pounds of a sugar dealer here in San Antonio at this date?

A. Any where from 25 to 35 cents on a hundred pounds.

Mr. Guild: That is FOB San Antonio?

The Witness: Huh?

Mr. Guild: FOB San Antonio?

The Witness: Yeah.

By Mr. Wolff, Jr.:

Q. That is based on the market here?

A. That's right.

Q. What is the present market here in San Antonio that sugar dealers would have to make or beat in order to sell a reasonable amount of sugar other than just isolated sales?

A. Well, a lot of them handle it on just two per cent, the cash discount, in quantities, and then it can be picked up here at the warehouse at the price less two per cent right there. They can pick it up in 25 bag lots or 50 bags or whatever amount they want at the carload price delivered in San Antonio.

Q. In other words, if somebody wanted to buy 25 bags of sugar, 2,500 pounds, he could buy it here from a warehouse at the carload price plus two per cent?

A. Less two per cent.

[fol. 243] Q. Less two per cent?

A. Yes.

Q. So that that is the figure that a sugar dealer has to beat in order to, or to match, in order to sell sugar?

A. That's right.

Q. Is sugar a perishable commodity?

A. Yes, sir.

Q. You mentioned other items that you handle. Is sugar the type of a commodity that has to be bought and sold by the broker or dealer in a fast manner, in other words, the purchase or sale, or have a rapid turnover of the particular item in order to realize any profit at all?

A. That's right, it has to be turned fast due to the cost of the item.

Q. The fact it will deteriorate?

A. That's right.

Q. And the fact it's a very short profit?

A. That's right.

Q. Are you familiar with any instances where Mr. Shannon has lost any sugar through deterioration or getting wet or anything like that?

A. Oh, yeah, he's had a few bags, not too many. Some get broke, and he will have to possibly sell them for a loss

to get rid of them, or they get wet, they get hard, you know, and it's unsalable. You can usually find some spot that he can sell it to.

[fol. 244] Q. Now, when that happens, something happens to the sugar, who takes the loss?

A. Mr. Shannon.

Q. Does the Aron & Company take any loss on it?

A. Absolutely not.

Q. Do you refund any of your commission?

A. Absolutely not.

Q. You say he hasn't had too much loss. Is that because he re-sells the sugar as fast as he can constantly trying to get rid of it?

A. That is right. In handling sugar the boys will break a bag once in awhile, maybe spill out five or ten pounds, something like that. Well, he will take a loss on that or something.

Mr. Wolff, Jr.: I believe that is all. Thank you.

Mr. Guild: No questions.

Exam. Mittelbronn: I think I would like to ask you a question.

The Witness: Yes, sir.

Exam. Mittelbronn: And in such capacity as broker you a broker just for J. Aron & Company or many other companies?

The Witness: Five other companies. I represent the Jefferson Island Salt Company, and handle a frozen sea-food line, handle Mardis Gras Soup line out of Louisiana.

Exam. Mittelbronn: And in such capacity as broker you make arrangements, do you make arrangements, that is, [fol. 245] only for the sales of the commodities or do you ever participate in arranging for the transportation?

The Witness: No, sir, just for the sales.

Exam. Mittelbronn: Thank you.

Mr. Wolff, Jr.: That is all. Thank you, sir.

(Witness excused)

Mr. Wolff, Jr.: Mr. Shannon.

Exam. Mittelbronn: Do you counsel wish to proceed or do you wish to have lunch? I am at your convenience. The day is—

Mr. Guild: I would like to proceed if it won't take too long.

Mr. Wolff, Jr.: I don't believe it will, sir. I would like to if it's all right with the Examiner, we would just as soon proceed.

Mr. Guild: All right.

Exam. Mittelbronn: Proceed.

Mr. Wolff, Jr.: Mr. Shannon.

RICHARD J. SHANNON was sworn and testified as follows:

Direct examination.

By Mr. Wolff, Jr.:

Q. Would you state your name, please, sir?

A. Richard J. Shannon.

Q. Where do you live, Mr. Shannon?

A. 439 Alexander Hamilton Drive.

Q. Is that here in San Antonio?

[fol. 246] A. That's right.

Q. What business or profession are you in?

A. Well, I am in the buying and selling of a number of different items.

Q. Would you tell us what items those are?

A. Well, we buy and sell livestock. We are also in the feed mill business. We sell corn, oats, wheat, bran, molasses, sugar and fertilizer and everything in the feed line.

Q. Mr. Shannon, how long have you been in business here in San Antonio?

A. Since 1934 or '5. I think it's 1934.

Q. Were you under the name of E. & R. Shannon?

A. That's right.

Q. What does the E. stand for?

A. Edward.

Q. Who is Edward?

A. My father. He died two years ago last February.

Q. You and he were partners in—

A. That's right.

Q. —various businesses?

A. That's right.

Q. And you have been on the yards or here in San Antonio since—I mean in this particular business—since 1934 approximately?

A. In the cattle end of it.

Q. When did you start handling sugar?

[fol. 247] A. I imagine a little over three years ago.

Q. And the other items, grain and fertilizer, molasses and stuff like that, when did you begin handling these other items?

A. That was about six years ago.

Q. I see.

So your operation is increasing, adding new, different items?

A. Lines, that's right.

Mr. Guild: Mr. Examiner, I will object to the leading of the witness.

Exam. Mittelbronn: Objection sustained. Counsel will proceed accordingly.

Mr. Wolff, Jr.: All right, sir.

By Mr. Wolff, Jr.:

Q. Who is Emma Shannon?

A. That is my mother.

Q. Is she a partner in the business?

A. She is a partner, yes.

Q. Would you explain to us just what interest she has in the business and what she does?

A. She does nothing whatsoever in the business. I operate the business, myself. She has a 25 per cent interest in the business and I have 75 per cent interest, and since my dad died we kind of split up the other 25 per cent, and I bought my sister's eight per cent out of the business.

Q. I see.

[fol. 248] Now, have you ever been over to Louisiana concerning sugar?

A. Yes, sir, I have, I have talked to—been to two or—let's see, it's two different sugar companies over there, talking to them on sugar.

Q. Why do you buy from Aron as opposed to the other outfits?



A. Well, we got started with them and we are just with them. That's about all I can say. We just got started with them.

Q. They give you a price that you are satisfied with?

A. At times we are and at times we are not.

Q. Have you ever done anything in the case that the price is too high to try to change?

A. Yes, we went over in Louisiana and he was charging us too much at one time, ten cents too high, and I went to another sugar company and they agreed to give me a ten-cent lower par price than Aron did on sugar, but he didn't have the different grades of sugar that we needed.

Q. So you continued operating with Aron?

A. So we continued operating with Aron.

Q. Now, have you ever had occasion to take any losses on sugar shipments?

A. Well, the breakage and sugar getting wet, we have taken losses, yes.

Q. Who bears those losses?

A. The company does.

Q. That is E. & R. Shannon, you mean?

[fol. 249] A. That's right.

Q. Have you ever had occasion to make any deals for the sale of sugar and have the purchaser here in San Antonio refuse to take it?

A. Yes, we have.

Q. Could you tell us the circumstances about that?

A. Well, at times we have had—we thought this man was going to buy sugar, and we order it, and when the truck gets in, beet sugar has been an obstacle against us in price—

Q. Where does beet sugar come from?

A. It comes from Colorado and some shipped from California.

Q. Is it coming into the market here now?

A. Yes, sir.

Q. And Canadians sometimes beat your price?

A. They are beating it right now.

Q. Now, that sugar that you thought that you had sold and the person refused to take it, what do you do with it?

A. Well, we have to put it in storage.

Q. Who bears the loss in case you can't re-sell it?

A. Well, the company would.

Q. Do you try to sell as much sugar as possible day by day?

A. Well, as people call in, we call them, we have an idea just about what we are going to use.

Q. Do you try to turn over your merchandise as fast as you can?

A. We try to turn it over. Otherwise the sugar, if it [fol. 250] stands too long, will get hard in the bag, and the customers complain about it, the dampness.

Q. Do you sell your sugar here for cash by and large or by and large for credit?

A. For credit.

Q. What credit terms do you have with your various purchasers?

A. Well, we generally give them ten days.

Q. And in case they pay in ten days do they get a discount?

A. A two per cent discount.

Q. You heard your bookkeeper testify as to certain figures in the record. So as to save time do you have anything to state as to any reason why those figures insofar as you know are not correct figures?

A. Well, to my best knowledge they are correct.

Q. Do you sell sugar in less than earload lots or less than the entire amount that comes, truckloads?

A. We sure do, and I believe we have some things there we can show that state that.

Q. Mr. Shannon, I show you some yellow sheets purporting to be invoices, E. & R. Shannon Company, and ask whether or not you have ever seen these instruments before?

A. Yeah, they are in our books over there.

Q. Just looking at those refresh your memory, would you tell us if you only made isolated sales of less than truckload lots of sugar or have you made frequent sales of less than truckload lots of sugar?

[fol. 251] A. We have made frequent sales of less than earload lots.

Q. Do those instruments represent the sales in the last year or even in a less period of time on less than truckload lots of sugar?

A. That's right.

Q. Well, where does that sugar come from?

A. It comes out of our warehouses.

Q. Do you try to sell it in less than truckload lots or do you prefer selling in truckload?

A. Well, that is up to the customer. We leave that up to the customer.

Q. You get the same price on less than a truckload lot per bag as you do a truckload lot?

A. We try to get—we generally get more for less than truckload lots.

Q. Why do you get the additional amount?

A. Well, the handling, the operation and handling, a higher cost.

Mr. Wolff, Jr.: I believe that is all.

Exam. Mittelbronn: Cross examination.

Cross examination.

By Mr. Guild:

Q. Mr. Shannon, what type of business were you in in 1934?

A. We were in the cattle business.

[fol. 252] Q. Just relegated to the cattle, sale of cattle?

A. Cattle, that's right.

Q. When was this refusal that you spoke of on your direct testimony? Do you recall?

A. Refusal? What do you mean by refusal?

Q. Refusal of sugar that you had. You stated that someone refused sugar that you had ordered.

A. We had a number of instances like that.

Q. When you speak of refusals—

A. In other words, we thought we would get a load in, we would have it sold, and wouldn't have it sold, and we would put it away for storage and lots of times we needed the truck right away, I got to put it away in storage.

Q. In other words, you had the order for the sugar and went up and got the sugar?

A. No, sir, we never have no orders on it at all. There's never an order going out.

Q. What do you mean by refusal then?

A. Refusal, we thought we had it sold to some different people.

Q. Well, then you hadn't purchased the sugar specifically for that customer that you thought you had sold it to?

A. No, no, no.

Q. Well, then, in the case you hadn't done that and the customer refused, in other words, what the customer did, he just said "I thought I wanted it and I don't want it"? [fol. 253] A. Well, lots of times we might call him, we might have a load on the way back and we will call a man and say "Would you buy a load of sugar?" And he may say "Yes", and "Call me tomorrow if I can use it or not," or "I might use it at the end of the week."

Q. Well, that truckload is already headed towards San Antonio?

A. That's right, yes, and sometimes we got it there on our property, our two and a half acres, on our property, that truckload.

Q. So nothing about the refusal cost you any extra, you didn't put yourself out because of that refusal, did you?

A. Well, lots of times the market is breaking, we got to put it in storage, and we have to sell it at a lower market.

Q. I know, but you had the sugar on order already, it was on the truck, the fact that it was on the truck and already purchased didn't mean that you had gone out of your way to obtain that sugar for that specific person, did it?

A. No, not necessarily, no.

Q. So that actually his refusal didn't result in any extra loss to you, it just meant that you didn't get a sale?

A. That's right.

Q. Now, could you send one of your big trucks up there with a driver, paying him a salary and paying the expenses of that truck, send an empty truck up to Supreme, Louisiana and transport that sugar back to San Antonio and sell [fol. 254] that sugar at a profit if you had just that operation, an empty truck up there and back?

A. We have done it.

Q. But could you do it profitably?

A. We have done it; yes, where we get a lot more money, where we get an order, maybe a load of sugar back, and tell us they need a load of sugar, and will we make a special trip there, but we get more money hauling it that way.

Q. But you couldn't send a truck up, I mean just, say, operate that way, send an empty truck up to Supreme, Louisiana, and buy sugar for sale in San Antonio?

A. Well, we have one big truck we can send and make a profit with it.

Q. You can?

A. Yes, sir, we have one big truck we can send and make a profit with it.

Q. How much does that truck carry in gross sugar weight?

A. 37,500 pounds.

Q. 37,500 pounds.

And let's see, that would be 375 bags, would it not?

A. That's right.

Q. How much would those bags cost you on an average?

A. On an average?

Q. Uh-huh, just what would be the cost to you?

A. On an average what is the sugar selling for at the time?

Q. Well, I am just asking you. What would be the average?

[fol. 255] A. Whatever the sugar is selling for at the time. I wouldn't know. What period do you want?

Q. Well, you stated you could send an empty truck up to Supreme, Louisiana and haul it back for a profit.

A. Yes, sir.

Q. In other words, you don't need to back haul sugar for a profit?

A. What is that?

Q. You don't need—you could operate without any other business, you could send empty trucks up to Supreme, Louisiana right now, and haul sugar back and make a profit on the sale of sugar in San Antonio at the price sugar is selling for now in San Antonio?

A. No, I do not.

Q. Oh, you couldn't?

A. No, I couldn't do that.



Q. So that is why most of the sugar is coming back as a back haul from the transportation of livestock and feed stuffs that's going up into the direction toward Louisiana?

A. I am in the buying and selling business, yes, sir, I am buying and selling.

Q. But I mean that is the reason why you are backhauling it?

A. I am backhauling to make money.

Q. I know that.

A. To make a profit. I am backhauling to make a profit. [fol. 256] Q. But in order to make that profit on the backhaul of sugar you would have to have something going up to Louisiana, would you not, as you stated you couldn't empty truck it up?

A. That's right.

Q. In other words, do you have the sale of livestock in Louisiana?

A. We have grain, livestock, anything we can buy and sell at a profit.

Q. And you are handling that product or those products and are largely in that business of livestock and grain?

A. Grain, molasses, sugar, all of them.

Q. And has that been for the whole six years that you have been in that type of business, selling up in Louisiana?

A. That's right, that's right.

Q. And until three years ago, why, you hadn't been handling sugar, so what did you return haul on your trucks?

A. What did we return haul?

Q. What was your backhaul?

A. Well, we brought salt, we brought grain.

Q. Did any of your trucks ever return empty?

A. Ever return empty?

Q. Uh-huh.

A. I guess there was times, yes, I guess there was times.

Q. So that when you backhauled grain and salt, anything you could sell, that grain or salt, at a profit, would mean [fol. 257] just that much off of what your expenses were in the initial haul of the livestock and feed stuffs up to Louisiana, is that correct?

A. Well, it was a profit to us. That is all I could say.

Q. And I think when we were in Mr. Wolff's office you stated that if you only could get the sugar at a one cent profit when it got back to San Antonio that would be one cent that you had. Do you remember making that statement?

A. I don't believe I made that statement, I don't believe I made that statement.

Q. But that would be true, I mean if you had livestock to be delivered up in Louisiana, and you transported that livestock up there and you backhauled the sugar, anything you made on that sugar would be just that much more profit? If you didn't have that sugar you would have had an empty backhaul or you would have tried to arrange for grain?

Mr. Wolff, Sr.: That is argumentative, Mr. Examiner.  
Exam. Mittelbronn: Sustained.

By Mr. Guild:

Q. Well, is that correct?

Exam. Mittelbronn: The objection was sustained. The question is argumentative.

Mr. Guild: I don't know how to ask the witness any other way except that:

(By Mr. Guild:

Q. Anything you receive on your sugar in a transportation haul that initiated as a livestock transportation up toward Louisiana would be that much profit?

[fol. 258] Mr. Wolff, Sr.: We still object.

Exam. Mittelbronn: The objection is sustained. There is no basis laid. Maybe the operation in carrying the livestock was a loss. Be specific, counsel.

Mr. Guild: Well, he stated he's in the livestock business.

Exam. Mittelbronn: Don't argue with the Examiner.

Mr. Guild: That is all.

Mr. Wolff, Jr.: That is all. Thank you, Mr. Shannon.

Exam. Mittelbronn: Mr. Shannon, have you ever received sugar from Louisiana since you have been handling

that commodity in the past three years, whatever it is, via any carrier for hire, that is common carrier or contract carrier?

The Witness: No, sir.

Exam. Mittelbronn: You have always transported the commodity in your own trucks?

The Witness: That's right, yes, sir.

Exam. Mittelbronn: Does the same hold true for all other commodities which you handle?

The Witness: Yes, sir.

Exam. Mittelbronn: You have never employed the use of a for hire carrier?

The Witness: No, sir.

Exam. Mittelbronn: In the conduct of your business?

The Witness: No, sir.

Exam. Mittelbronn: Thank you, sir.

[fol. 259] Mr. Wolff, Jr.: Thank you, Mr. Mittelbronn.

By Mr. Guild:

Q. Mr. Shannon, may I ask a question.

Do you ship livestock by rail?

A. Do I ship livestock by rail?

Q. Yes.

A. Yes, sir, yes, sir.

Exam. Mittelbronn: Did the witness understand the Examiner's question, namely, had you ever employed any carrier for hire to transport any of your products in your business?

The Witness: Excuse me, but the way I understood you to state it, you stated sugar.

Exam. Mittelbronn: I stated first sugar. Then I said any of your commodities that you handle. You misunderstood me.

So you have employed in the past a contract carrier for the transportation of livestock? I mean a common carrier, rail.

The Witness: Yes, sir, yes, sir, and grain.

Exam. Mittelbronn: And grain also?

The Witness: Yes, sir.

Exam. Mittelbronn: Those were on your outbound shipments to your customers, I take it?

The Witness: Inbound, inbound and outbound, too.

Exam. Mittelbronn: Oh. Do you still employ any common carriers for hire in the transportation of the articles you handle other than sugar?

The Witness: Coming in we do. In other words, inbound [fol. 260] to San Antonio we do get grains and different things brought in to us by the railroad.

Exam. Mittelbronn: From origins in Louisiana?

The Witness: Louisiana, yes, sir, yes, sir.

Exam. Mittelbronn: I have nothing further. Counsel?

Mr. Guild: I have nothing further.

Mr. Wolff, Jr.: Nothing, thank you.

(Witness excused.)

#### RESPONDENT RESTS

Mr. Wolff, Jr.: The Respondent rests.

Mr. Guild: We rest. I request the opportunity to file briefs.

Exam. Mittelbronn: Fine. Off the record.

(Discussion off the record.)

Exam. Mittelbronn: On the record.

In the off the record discussion it was agreed by counsel that briefs would be submitted. The brief date is hereby set on May 15, 1957.

If there is nothing further to be brought before the Commission the record is closed.

(Whereupon, at 12:15 p.m., Friday, March 29, 1957, the hearing in the above-entitled matter was closed.)

[fol. 261]

## BEFORE THE INTERSTATE COMMERCE COMMISSION

## EXHIBIT No. 1

MC-C-2055, Emma Shannon and Richard J. Shannon,  
doing business as E. and R. Shannon, and J. T. Wilcox, do-  
ing business as Wilcox Brokerage Company

PURCHASES OF SUGAR FROM J. ARON & Co.,  
SUPREME, LOUISIANA

<i>Shipment</i>	<i>Invoice</i>		<i>Dray Receipt</i>	<i>Cost F.O.B.</i>
<i>Date</i>	<i>No.</i>	<i>Date</i>	<i>No.</i>	<i>Supreme, La.</i>
5-15-56	1683	5-14	3893	5-15 \$2610.72
5-27-56	2266	5-26	4267	5-27 3068.62
6-5-56	2704	6-4	4531	6-5 3068.63
6-6-56	2751	6-6	4589	6-6 2895.17
6-16-56	3215	6-16	4887	6-16 2521.54
6-21-56	3440	6-21	5034	6-21 2928.24
7-20-56	4954	7-20	6144	7-20 3068.63
7-29-56	5372	7-28	6389	7-29 2608.76
7-31-56	5440	7-31	6437	7-31 3057.60
8-2-56	5549	8-2	6532	8-2 2602.88
8-6-56	5663	8-5	6667	8-6 2618.56
8-15-56	6100	8-15	7011	8-15 2536.73
8-23-56	6349	8-22	7228	8-23 3050.25
8-30-56	6665	8-30	7459	8-30 3058.83
8-29-56	6606	8-29	7412	8-29 2536.73



[fol. 262]

## SALES OF SUGAR BY E. AND R. SHANNON, SAN ANTONIO, TEXAS

<i>Sales Slip No.</i>	<i>Date</i>	<i>Consignee San Antonio</i>	<i>Resale Price Delivered San Antonio</i>	<i>Differ- ence</i>	<i>Net Profit in cents per 100 lbs.</i>
1262	5-16	Lawler	\$2736.16	\$ 125.44	39.2
1267	5-29	Judson Knowlton	3236.45	167.83	44.7
1271	6-7	Knowlton	3252.37	183.74	49
1273	6-8	Lawler	3034.32	139.15	39.2
1277	6-17	Barq's	2658.25	136.71	44
1283	6-23	Lawler	3069.36	141.12	39.2
1296	7-21	Lawler	3242.75	173.74	46.3
1297		Knowlton			
1298	7-30	Lawler	2734.20	125.44	39.2
1299	8-2	Lawler	3119.09	143.08	39.2
1300	8-4	Barq's	2744.00	141.12	44
1301	8-7	Knowlton	2775.36	156.80	48.1
1306	8-17	Knowlton	2673.44	136.71	44
	8-24	Barq's	3197.25	147.25	39.2
1313	8-31	Lawler	3182.55	123.72	33
1312	8-31	Guerra (Laredo)	2620.27	83.54	27
				\$2125.39 (Total)	35.74 (Average)

[fol. 263]

## BEFORE THE INTERSTATE COMMERCE COMMISSION

## EXHIBIT No. 2

MC-C-2055, Emma Shannon and Richard J. Shannon,  
doing business as E. and R. Shannon, and J. T. Wilcox,  
doing business as Wilcox Brokerage Company.

Exhibit showing rail rates in carload and less carload  
quantities on Sugar, Beet or Cane, between Supreme,  
Louisiana, and San Antonio, Texas, effective May 15, 1956,  
through August 30, 1956.

[fol. 264]

## RAIL RATE, CARLOADS

Effective on May 15, 1956 through August 30, 1956

ON

SUGAR, BEET OR CANE

Supreme, La. to San Antonio, Texas.

Rate, Carloads 69\* cents per 100 pounds.

Minimum Weight 60,000 pounds.

## Authority:

Item 1912-A, Page 6, Supplement 15, SWL Tariff 72-F,  
Agent F.C. Kratzmeier's ICC 4088 effective Dec. 31,  
1955.

Base rate of 65 cents per 100 pounds subject to X-196-A  
increase.

(Supreme, La. takes Group 1 basis as shown on Page 8  
of tariff.

## Routing:

Page 93 of tariff as explained on Pages 225 and 226.

From Supreme, La., a station in Louisiana assigned  
Group 1 on Southern Pacific Lines.

To San Antonio, Texas, a station located on T&NO (Sou.  
Pac. Lines), I-GN (MP Lines), SAU&G (MP Lines) and  
MKT of T.

\* For note referred to, see next page.

Route Numbers:	EXPLANATION
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SP 2 Sou. Pac. Lines

SP 122 Sou. Pac. Lines, Houston, Tex., MKT of T

SP 125 Sou. Pac. Lines, Houston, Tex., Mo. Pac. Lines

\* Rate includes increase of 6 percent published in Table 1, Page 18 (as instructed in Item 5) of Tariff of Increased Rates and Charges X-196-A, Agent F. C. Kratzmeier's ICC 4193, effective March 7, 1956.

Note—The Texas and New Orleans Railroad Company (Sou. Pac. Lines), International-Great Northern Railroad Company (MP Lines), San Antonio, Uvalde and Gulf Railroad Company (MP Lines) and Missouri-Kansas-Texas Railroad Company of Texas participating in above rate and routes on Sugar from Supreme, La., to San Antonio, Texas, are included in list of participating rail carriers shown on pages 2, 3, 4 and 5 of SWL Tariff 72-F.

[fol. 265]

RAIL RATE—LESS CHARGES

Effective on May 15, 1956 through August 30, 1956

ON

SUGAR, BEET OR CANE

Supreme, La. to San Antonio, Texas.

Rate, LCL 138\* cents per 100 pounds.

Minimum Weight LCL

Authority

Class 55, Items 18820 (other than raw), and 18825 (raw), uniform freight classification No. 3, Agent Geo. H. Dumas' ICC A-3, effective Sept. 11, 1955

AND

SWL Tariff SW-1004, Agent F. C. Kratzmeier's ICC 3997, effective May 30, 1952. Base rate of \$1.30 as shown on Page 175 for rate basis 517 as shown on page 88 from Thibodaux, La., to San Antonio, Texas, applicable from Supreme, La., per page 350 of National Rate

\* For note referred to, see next page.

Basis Tariff 1, Agent L. E. Kipp's ICC A-3931, effective May 30, 1952, and Page 154 of National Rate Basis Tariff 1-A, Agent W. J. Prueter's ICC A-4160, effective September 1, 1956.

\* Rate includes increase of 6 percent published in Table 1, Page 18, (as instructed in Item 5) of Tariff of Increased Rates and Charges X-196-A, Agent F. C. Kratzmeir's ICC 4193, effective March 7, 1956.

**Routing:**

Routing instructions in Item 1000-Series of SWL Tariff SW 1004 provides for routes specified in and explained on Pages 1115, 1116 and 1118 of SWL Tariff 221-D, Agent F. C. Kratzmeir's ICC 4173, effective November 15, 1955.

FROM: Supreme, La. (Sou. Pac. Lines Station 315)

TO: San Antonio, Tex. (Sou. Pac. Lines Station 3365)

(IGN (MoPac Lines) Sta 3670

(SAU&G (MoPac Lines) Sta 4600

(MKToFT Station 4371

[fol. 266]

The Routes and items covering are:

Route 82, Item 2, Table 8282, Page 1062

Route 139, Item 26, Table 5282, Page 859

Route 151, Item 26, Table 5282, Page 859

Route 151, Item 2, Table 5582, Page 871

Route 443, Item 26, Table 5282, Page 859

Route 443, Item 2, Table 5582, Page 871

Route 443, Item 106, Table 4782, Page 538

Route 803, Item 2, Table 5582, Page 871

Route  
Numbers

EXPLANATION

82 Sou. Pac. Lines

139 Sou. Pac. Lines, Austin, Tex. Mo Pac Lines ..

151 Sou. Pac. Lines, Beaumont, Tex., Mo Pac Lines

443 Sou. Pac. Lines, Houston, Tex., Mo Pac Lines

443 Sou. Pac. Lines, Houston, Tex., MKToFT

803 Sou. Pac. Lines, San Antonio, Tex., Mo Pac  
Lines

**NOTE:** The Texas and New Orleans Railroad Company (Sou. Pac. Lines), International-Great Northern Railroad Company (Mo. Pac. Lines), San Antonio, Uvalde & Gulf Railroad Company (Mo. Pac. Lines) and Missouri-Kansas-Texas Railroad Company of Texas participating in above rate and routes on sugar from Supreme, La., to San Antonio, Texas, are included in list of participating rail carriers shown on following pages of tariffs involved:

SWL Tariff SW-1004—Pages 3 and 4

SWL Tariff 221-D—Pages 3, 4 and 5

Uniform Freight Classification 3—Pages 5, 6, 7, 8 and 9

National Rate Basis Tariff 1—Pages 4, 5, 6, 7, 8, 9, 10 and 11

National Rate Basis Tariff 1-A—Pages 3, 4, 5, 6, 7 and 8.

[fol. 267]

EXHIBIT No. 3

**BEFORE THE INTERSTATE COMMERCE COMMISSION**

MC-C-2055, Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, and J. T. Wilcox, doing business as Wilcox Brokerage Company.

Exhibit showing regular route common motor carrier rates on sugar, beet or cane, between Supreme, Louisiana, and San Antonio, Texas, effective May 15, 1956, through August 30, 1956.



[fol. 268]

## RATES VIA REGULAR ROUTE COMMON MOTOR CARRIERS

ON

SUGAR, BEET OR CANE, OTHER THAN RAW—

From SUPREME, LOUISIANA  
To SAN ANTONIO, TEXAS

In effect between the dates of May 15, 1956, and August 30, 1956, (both inclusive).

- (1) Rate 170 cents per 100 pounds. Applicable to L.T.L. Shipments.
- (2) Rate 109 cents per 100 pounds, Volume Minimum wghts. 14,000 lbs.
- (1) Tariff Authority:  
LTL

Item 40840, National Motor Freight Classifications A-2 and A-3, American Trucking Associations, Inc., MF-I.C.C. Nos. 6 and 8 respectively. Class 55—LTL Quantities.

NMFC A-2 Effective from May 15, 1956 through June 6, 1956.

NMFC A-3 Effective from June 7, 1956 through August 30, 1956.

Southwestern Motor Freight Bureau, Inc. Tariff 301-A, J. D. Hughetts, Agent, MF-I.C.C. No. 221 provided the LTL Class 55 rating of 170 cents between the dates of May 15, 1956 and August 30, 1956, both inclusive.

Item 10 D, Supplement 27, SWMFB Tariff 301-A, Effective February 2, 1956 and remaining in effect through August 30, 1956 subjects rates in tariff 301-A to National Motor Freight Classification A-2 and its successive issue NMFC A-3 (See Item 2300, Page 63, Tariff 301-A).

[fol. 269] Tariff 301-A is constructed on the group to group principle. Supreme, La. is assigned the

Thibodaux, La., group and San Antonio, Tex. is assigned the San Antonio, Tex. group (Pages 15 and 33, original tariff).

Rates basis 517 is provided from Thibodaux group to San Antonio group (Page 137).

Item 2400-A, Sup. 27, 301-A refers to pages 211 to 218 of tariff (as amended) for rates to apply in connection with NMFC A-2 (and A-3).

Page 213 shows the Class 55 rate in connection with rate basis 517 to be 160 cents—(Column 1).

Item 2450-B, Sup. 27 and Item 2450-C, Sup. 37 explain that the Column 1 rate is applicable in connection with LTL shipments.

Supplement 33 (Effective March 7, 1956) provides that the rate of 160 cents shall be increased to 170 cents.

(2) Tariff Authority:

Volume

Exception rate. Item 10, (paragraph 1, (b)). Southwestern Motor Freight Bureau, Inc., tariff 15-I, J. D. Hughett's MF-L.C.C. 224 states that the ratings, rules and weights provided in tariff 15-I take precedence over similar matter in National Motor Freight Classification.

Rate 109 in Class 35 E, Min 14,000 as provided in item 4970 (page 58) Southwestern Motor Freight Bureau, Inc., tariff 15-I, J. D. Hughett's MF-L.C.C. No. 224. Ratings and Rates remained in effect between May 15, 1956 and August 30, 1956, both inclusive.

[fol. 270] Item 4970, SWMFB Tariff 15-I provides volume rating of Class 35 E on Sugar in the territory referred to as Basis B-1 which is explained in item 10120 of the same tariff as being applicable in connection with the rates in Southwestern Motor Freight Bureau, Inc. tariff 1-K, J. D. Hughett's MF-L.C.C. No. 205 (See page 29 of Tariff 15-I).

Item 10520 (page 99) of Tariff 15-I provides for successive publications and by so doing authorizes use

of SWMFS Tariff 1-M, J. D. Hughett's MF-I.C.C. No. 245. Tariff 1-M was effective between May 15, 1956, and August 30, 1956 (inclusive).

Item 10-A Supplement 16 and Item 10-B Supplement 27, (paragraph 2 (b)) SWMFB Tariff 1-M provides for the use of exception ratings in Tariff 15-I (Basis B-1) in connection with the rates in tariff 1-M.

Item 2000 of Original tariff 1-M and Item 2000-A, Supplement 27 to tariff 1-M (Effective between May 15, 1956, and August 30, 1956, inclusive) provide that the Basis B-1 ratings in tariff 15-I shall proceed through the first class (Class 100) in Item 2020 of the same (1-M) tariff to subordinate rates in the rate table in Section 4 of Tariff 15—which is explained on page 36 and in item 10 of tariff 15 as being Tariff 15-I, J. D. Hughett MF-I.C.C. No. 224.

Item 2020 of tariff 1-M is a distance table of first class rates (Class 100).

Rules for computing distance are provided in paragraph 5 of Item 10-A, Supplement 16 and Item 10-B, Supplement 27 to tariff 1-M. These items also provide for the use of Tariff 14-D issued by SWMFB, Inc., J. D. Hughett's MF-I.C.C. No. 234 to obtain distances used in determination of rates in Tariff 1-M.

[fol. 271] Table 1560 (Page 239) of Mileage Tariff 14-D shows distance of 61.7 miles from Supreme, Louisiana, to Franklin, Louisiana. Page 115 of the same tariff shows distance of 465.7 miles from Franklin, La. to San Antonio, Texas. Combining these figures produces a distance of 527.4 miles from Supreme, La. to San Antonio, Texas. (See item 90, page 30, for rules for computing).

Applying distance of 527.4 miles against the first class rates in table of rates shown in item 2020 of tariff 1-M the result is a first class (Class 100) rate of 339 cents. This rate of 339 is increased to 359 cents as authorized by Item 1-A Supplement 18 to Tariff 1-M Effective

between May 15, 1956, and August 30, 1956, inclusive. Referring to the rate table in Section 4 of tariff 15-I, pages 167 and 168 and applying the first class rate of 359 against the table we obtain Class 35 E Rate of 1.09.

Examination of tariffs shows that no stopover or multiple delivery privileges were applicable in connection with these rates—

Thus:—

5000 pound lot would be subject to rate of 170  
10,000 pound lot would be subject to rate of 169 in connection with minimum wgt of 14,000#.

[fol. 272]

EXHIBIT A TO COMPLAINT

Clerk's Note:

"Report and order recommended by R. J. Mittelbronn, Hearing Examiner with Notice to Parties, served August 29, 1957" is omitted from the record here as it appears at page 9, side folio 11 supra.

[fol. 278]

EXHIBIT B TO COMPLAINT

Clerk's Note:

"Report and Order of the Commission, decided August 3, 1959 with Appendices" are omitted from the record here as they appear at page 17, side folio 17 supra.

[fol. 297]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-2055

## In the Matter of

EMMA SHANNON AND RICHARD J. SHANNON dba E. AND  
R. SHANNON AND J. T. WILCOX, dba WILCOX BROKERAGE  
COMPANY—INVESTIGATION OF OPERATIONS

PETITION OF EMMA SHANNON AND RICHARD J. SHANNON dba  
E. AND R. SHANNON FOR RECONSIDERATION—

Filed September 8, 1959

Due date of Petition: September 10, 1959

## Statement of Case

This is a proceeding in the nature of the investigation of the operations of Emma Shannon and Richard J. Shannon, dba E. & R. Shannon Co., hereinafter called petitioners, or respondents or Shannons, and J. T. Wilcox dba Wilcox Co. The proceeding against J. T. Wilcox has been discontinued.

No statement of fact in this statement of the case will cite parts of the Statement of Facts to support the statement, but instead an evidence abstract will be contained immediately after this statement, which will cite relevant portions [fol. 298] of the Statement of Facts to all facts herein contained and contained in the argument, so that this statement will be merely a brief introductory statement setting up the general nature of this matter.

The purpose of the investigation was and is to determine whether or not certain operations of the Shannons are violations of the Interstate Commerce Act. More particularly, Richard J. Shannon was previously a partner with his father who died and now he is technically a partner with his mother, Emma Shannon; who owns an interest in the business by virtue of her husband's death, but actually, Richard Shannon operates and manages the business him-



self. According to Mr. Leon J. Whitehead, the District Supervisor of the Interstate Commerce Commission, Bureau of Motor Carriers with Headquarters at San Antonio, Texas, the facts developed by him and resulting in the hearing were developed by a mere routine investigation. The operations of E. & R. Shannon had been previously investigated by the Interstate Commerce Commission within the past several years, with no action taken against E. & R. Shannon, even though their operations were the same at the date of the prior investigation as they are now.

E. & R. Shannon are in the business of buying and selling many items including livestock, feed stuffs, molasses, fertilizers, salt and sugar. The only question that has been raised concerning their buying and selling of sugar involves whether or not they are a private carrier and it is therefore unnecessary for them to obtain an Interstate Commerce Commission permit to transport the sugar which admittedly is taken across the state line. Respondent Shannon contends that he is clearly a private carrier, is legitimate in the sugar business and has been for several years and, therefore, is not required to obtain a permit to transport his sugar.

After the hearing in this matter was completed both parties filed written briefs. Subsequent thereto the hearing examiner prepared and filed a recommended report and order recommending that the investigation of Emma Shannon and Richard J. Shannon dba E. & R. Shannon be discontinued. The Bureau of Inquiry and Compliance filed exceptions to the Examiner's report and the Respondents replied to such exceptions. Thereafter Division 1 of the Interstate Commerce Commission made a report concerning this matter and an order requiring respondents to cease and desist forthwith and thereafter to refrain and abstain jointly and severally from all operations in interstate or foreign commerce of the character found in the said Division report to be unlawful unless and until appropriate authority therefor is obtained, such order to become effective September 18, 1959. The said Emma Shannon and Richard J. Shannon dba E. & R. Shannon hereby file this their motion for reconsideration before the Interstate

Commerce Commission to reconsider such report of the Commission by Division 1.

### Evidence Abstract

E. & R. Shannon are a partnership with E. Shannon being dead and Richard Shannon and Emma Shannon having a 25% interest in the business (Statement of Facts—SF 73-74). J. T. Wilcox is in the brokerage business handling many items and sells Mr. Shannon sugar through J. Aron & Co. in Louisiana, upon which Wilcox receives a commission from J. Aron & Co. (SF 67-68). That Wilcox has no interest in the Shannon business except the commission he receives from J. Aron & Co. (SF 68). That the facts developed by Mr. Whitehead, the District Supervisor with the Interstate Commerce Commission at San Antonio were made and developed as a result of a routine investigation (SF 13). That about two years prior to the hearing, Mr. Shannon received a communication from the commission concerning the question of his sugar business and no action was taken against him at that time (SF 21). That Mr. Richard Shannon is in the business of buying and selling livestock, in the feed mill business and also sells corn, oats, wheat, bran, molasses, sugar, fertilizers and everything in the feed line (SF 73), also salt (SF 16). That Shannon has been in business since about 1934 and began handling grain, fertilizers, molasses and similar items about six years ago (SF 73-74) and sugar a little over three years ago (SF 73-74). That Mr. Shannon has seven trucks valued at \$14,176.50 (SF 45) as of December 31, 1956, (SF 42-43). That of these seven trucks (SF 60) only three of them are used for long hauling which includes the hauling of sugar (SF 59-60). Also the trucks are not only used for hauling sugar but for hauling many other items. That the total amount of fixed assets of the company including mill equipment, office furniture, automobiles, etc. is \$59,350.26 as of December 31, 1956, (SF 46-47; SF 42-43). That the asset accounts listed on the balance sheet as of December 31, 1956, remained fairly constant during the year 1956 and were constant up to the date of the hearing (SF 49). That in addition to the fixed

asset accounts there were \$56,459.91 in current assets of which \$30,000.00 was in accounts receivable leaving \$26,000.00 in actual assets including approximately \$4,700.00 [fol. 301] cash and the rest prepaid expenses, inventories, etc. (SF 48) so that the three trucks being used to haul sugar represented in a total of seven trucks, the seven trucks being valued at \$14,176.50 was a small percentage of the total assets of the company, and further that such trucks used for hauling sugar were not used for same exclusively but on the contrary were also used to haul many other items. That the salaries paid the truck drivers used on the large trucks average about \$240.00 per week (SF 50) out of the total payroll of \$1,100.00 per week (SF 50) and, of course, as above stated, the three truck drivers on the three large trucks were not paid exclusively for hauling sugar but hauled many other items. That Mr. Shannon purchases sugar from J. Aron & Co., sugar refinery, Supreme, Louisiana, and that the sugar is billed to Mr. Shannon. This is admitted by Mr. Whitehead (SF 21-22). Also when Mr. Shannon sells sugar, such purchaser purchases the sugar from Mr. Shannon. This is pointed out because Mr. Whitehead used the word "consignee" to designate the person to whom Mr. Shannon sold the sugar and in Exhibit No. 1 introduced into evidence and to which respondents Shannon and Wilcox objected, the word "consignee" was used. However, Mr. Whitehead admitted that he used this word in error and that the sugar was always billed to Mr. Shannon and that the person Mr. Shannon sold sugar to should have been designated as the purchaser (SF 22). That Mr. Shannon purchases sugar from Aron because he got started with them (SF 75) and has gone to Louisiana to attempt to get a reduction in price and actually contacted another concern to get a lower price, but that that concern did not have the needed grades of sugar so that Mr. Shannon has continued dealing with Aron (SF 75). [fol. 302] That when something happens to the sugar after it is purchased from J. Aron & Co., the loss on same is borne wholly by Shannon (SF 75-76; SF 70-71). That Shannon does not take orders for sugar and then obtain the sugar from Louisiana (SF 79) and; in fact, on a number of

instances, he has had some sugar already en route coming back and thought he had the sugar sold and it turned out that the prospective purchaser refused the sugar which meant that it would have to be stored and another purchaser attempted to be found (SF 79). This did not mean that he had the order before he purchased the sugar from Aron & Co., as Mr. Shannon himself (SF 79) but instead points to the fact that Shannon legitimately buys sugar from Aron & Co. and, if he cannot recall it, has to stand whatever loss there may be on the declining market or in case the sugar is damaged (SF 79) and, of course, as was pointed out by the attorney for the Bureau of Inquiry and Compliance that even though the prospective purchaser's refusal to purchase did not cost Mr. Shannon anything extra (SF 80); still, as a matter of common sense—in a business where the market breaks rapidly and the commodity deteriorates quickly, the loss of a sale can mean a considerable loss since the cash representing the sales price is negotiable but many bags of sugar are not (SF 80). That the margin of profit in the sugar business is comparatively small and a reasonable profit for a sugar dealer in San Antonio on the date of the hearing, that is, March 1957, is 25 to 35¢ per 100 lbs (SF 69). Without waiving any objection respondents have made to the introduction of Exhibit No. 1, respondent would state that his profit as shown on such Exhibit of an average of approximately 35¢ per 100 pounds is merely the normal profit of a sugar [fol. 303] dealer wherein the figures contained on Exhibits Nos. 2 and 3 designating the freight rates are entirely dissimilar. Of course, the margin of profit would vary somewhat from the March 1957 date back into 1956, but there is no testimony that this variance was very much. In fact, Mr. Whitehead testified that he did not know what the margin of profit would be (SF 23). That sugar is a perishable commodity (SF 70) and has to be turned over rapidly to realize any profit at all, because it will deteriorate (SF 70) and has a very short profit (SF 70); that the cost of unloading sugar and storing it is comparatively high and eats into or completely causes to vanish any profit that those in the sugar business might make (SF 17). That the

price fluctuations in the sugar business are also quite drastic (SF 23 to 25) which again necessitates moving the item fast to avoid a possible loss. That it is necessary to sell sugar as quickly as possible to avoid this loss which, of course, is true in any mercantile business and yet, some items are more perishable than others (SF 24). Naturally Mr. Shannon tries to sell his sugar as quickly as possible because of the above reasons but, as above set out, he does not obtain orders for sugar and then purchases same but maintains a reasonable steady flow of sugar on his returning trucks from Louisiana. Also, as above stated, he may get the sugar sold as a truck is returning from Louisiana and then find that it is not sold. On occasion he will even send an empty truck over to Louisiana to load sugar (SF 16), but as a matter of common sense, it would be more profitable for him to be delivering some commodity that he was selling to Louisiana at the same time.

Be that as it may, when the sugar is returned to San [fol. 304] Antonio, some of it might be sold while the truck is returning inasmuch as Shannon knows something about what his customers generally would want. However, a considerable amount of sugar remains in the warehouse (SF 35, 36, 37). From this stored sugar frequent sales in less than carload lots are made (SF 77-78). Shannon has on occasion even stored sugar in commercial warehouses when his warehousing facilities because of the amount of sugar and other items on hand at that time were inadequate. However, because of the small margin of profit such a situation proved unprofitable (SF 36-37; SF 29-30). Also as to the sales included in Exhibit No. 1, to which respondents objected, because among other reasons same represented merely isolated sales of the parties, Mr. Whitehead admitted that the purchase and sale of sugar by Mr. Shannon was not limited to the individuals or companies listed on Exhibit No. 1, but simply that those persons did represent the principal purchasers from Mr. Shannon but not that all of the purchases that those particular purchasers made during the period covered in the exhibit were listed (SF 20). Although this point might have no direct relevance to the case it is pointed out, so that a complete



picture of the worth of Exhibit No. 1 may be brought to the attention of the Commission.

That there is no evidence in the record showing that there are any identifiable transportation charges made by the Shannons to the purchasers of the sugar, nor have the Shannons any basis or formula for accessing transportation charges but instead their sales are governed solely by the market price of sugar in San Antonio. There is no evidence in the record showing that the Shannons hold themselves out to the general public to haul sugar for any compensation.

[fol. 305] That Mr. Shannon sold almost all of the sugar to purchasers on credit (SF 37-38). These sales had been made on credit since the inception of Mr. Shannon's sugar business, that is, approximately three years, (SF 41). That at the date of the hearing in March 1957, Mr. Shannon had more than \$10,000.00 tied up in accounts receivable from purchasers of sugar (SF 41). That at times during 1956 he has had as much as \$20,000.00 and \$30,000.00 tied up in accounts receivable from sugar purchasers (SF 42). That any sugar on a truck on the date of taking inventory was carried in the inventory showing clearly that the sugar belonged to Shannon and he considered it his (SF 54). Of course, what is considered a large inventory varies depending on the business and a large inventory in the sugar business would be a considerably less inventory than would an inventory of more stable products where the market does not fluctuate nor the item deteriorate so rapidly.

Nowhere does Mr. Whitehead testify from his own knowledge but is merely quoting what Mr. Shannon and Mr. Wilcox said. The record as a whole should be inspected to determine what Shannon's true operations were and, as Mr. Whitehead said, Mr. Shannon very vehemently declares "that this is a legitimate business of his; that he is in the sugar business" (SF 16).

### Alleged Errors in Report of Division 1, Interstate Commerce Commission.

Point of Error No. One. Division 1 of the Interstate Commerce Commission erred in finding and concluding that the transportation of the sugar by the Shannons is with respect to their primary business of buying and selling livestock and certain other commodities a related or secondary enterprise conducted with the purpose of profiting [fol. 306] from the transportation performed and as such constitutes for-hire carriage for which authority from the Commission is required.

Point of Error No. Two. Division 1 of the Interstate Commerce Commission erred in finding and concluding that Emma Shannon and Richard J. Shannon, dba E. & R. Shannon, have been and are engaged in transportation in interstate commerce of sugar from Supreme, Louisiana, to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority in violation of Sections 206 (a) and 209 (a) of the interstate commerce act and that an order should be entered requiring them to cease and desist from all such for-hire operations until appropriate authority is obtained from the Commission.

### Argument and Authorities

Shannons would first submit that the introduction into evidence of the railroad and trucking freight rates from Supreme, Louisiana, to San Antonio, Texas, are completely irrelevant to any issue in this matter. In the case of the Commission vs. A. W. Stickle & Co. (128 Fed. 2d. 155), the rates were relevant because they show that the profit Stickle & Co. obtained for their sale of lumber was the same as the freight rate so that in effect all that Stickle & Co. was doing was obtaining money for freight under the guise of being in the lumber business. However, there are so many differences between the Stickle case and the matter at bar that it will be hard to list them all. But to discuss the one immediately at hand, obviously if the freight rate is considerably different from the average profit obtained by a man in the sugar busi-

ness then the freight rate itself has no application what-  
 [fol. 307] soever to a determination of, whether or not  
 such sugar merchant is actually in the trucking business.  
 Of course, the 15 isolated sales introduced into evidence  
 in Exhibit No. 1 are not conclusive of the operations of  
 respondent Shannon and clearly apply to only a limited  
 period but assuming for purposes of argument that they  
 are conclusive, they are obviously the transactions se-  
 lected by the Bureau of Inquiry and Compliance to prove  
 their point; that there is a situation involved of a com-  
 mon or contract carrier as opposed to a private carrier.  
 However, their own figures show that the average profit  
 obtained is not the freight rate but far from it. Instead  
 it is simply the reasonable profit of a sugar merchant in  
 the locality where respondent Shannon operates. Obvi-  
 ously respondent Shannon does not raise sugar, so nat-  
 urally the cost of hauling sugar is an important factor  
 to determine his margin of profit, since he buys and sells  
 sugar, but his storing costs, bookkeeping costs, bad debts,  
 inventory losses, unloading costs, etc. are also important  
 factors and just because hauling is an element of his costs  
 does not mean by any stretch of the imagination that he is  
 in the trucking business for hire.

Regardless of what one calls it, whether or not Shannon  
 is in the trucking business would invariably boil down to  
 the question of are his operations really a subterfuge; for  
 although technically a finding along this line is unneces-  
 sary to hold that he is in the trucking business, still, as  
 a practical matter, this question of subterfuge seems all  
 important and unless all the evidence in the hearing is  
 disbelieved, respondent Shannon respectfully submits  
 that he is definitely and clearly a legitimate sugar mer-  
 [fol. 308] chant. How else could he be in the business of  
 buying and selling sugar when he does not raise it? He  
 buys sugar from a manufacturer, hauls it to his place of  
 business taking title in his own name and bearing all  
 the losses connected therewith; sells the sugar on credit  
 with the attendant possibility of bad debt loss and in the  
 interim period stores and inventories the sugar. What  
 more could he do to be considered a legitimate sugar mer-  
 chant? Is it necessary for him to haul by rail and pay

such costs when he has his own trucks available for hauling and has had them available over the years for his complete operation, starting with livestock and expanding over the years to feed stuffs, grain, corn, molasses, salt and sugar.

In the Stickle case there was a certain charge for hauling depending on where the customers were. There was practically no lumber in Stickle's inventory. In our case there was considerable sugar inventory considering the nature of the market in the sugar business and there are no definite charges made for hauling to various places. In fact there are no charges whatsoever made and no deliveries made but the only hauling is the bringing of the sugar from the manufacturer to Shannon's place of business. His charges do not vary with the delivery charge as in the Stickle case but instead his price for the sale of sugar varies strictly with the market for sugar. His entire profit comes from the buying and selling of sugar and it is brought only to San Antonio for sale and the question of transportation rates does not even enter into Shannon's charges. If his cost of hauling, plus the amount that he purchases the sugar for, plus the loading, unloading, storage, etc. amounts to more than the going price [fol. 309] in San Antonio, Shannon loses money. Also, in the Stickle case, the principal payroll of the company was tied up with the paying of truck drivers and the principal assets of the company were invested in transportation facilities. In Mr. Shannon's case the opposite is true. Less than 25% of his salaries are tied up with truck drivers and these truck drivers representing the less than 25% of the salaries paid, do not haul exclusively sugar but instead haul many other items including livestock, grain, salt, etc. Also the trucks used for hauling sugar are a small percentage of the total assets of the company and again these trucks are far from considered being used exclusively for the hauling of sugar.

Also the court in the Stickle case emphasized the fact that normally contracts were entered into to sell and transport the lumber to a certain purchaser before Stickle purchased the lumber from elsewhere. But in the matter at bar the opposite is true. It is also evident that sugar

is a much different commodity from lumber in that it is more perishable, is subject to greater market fluctuations and the margin of profit for sugar is smaller. Because of this it is necessary for a sugar merchant to sell his sugar quickly to prevent the possibility of a loss and for that reason an inventory of sugar would be considered greater, even though it did not have the same value in dollars and cents as an inventory in lumber, since it is not the practice of sugar merchants to keep large supplies of sugar on hand. Sugar must be sold quickly at a small profit, so that it would naturally behoove Shannon to sell his sugar as fast as he could, but even with this added factor involved, by his own testimony he still does not make it a practice to obtain an order for sugar and then purchases same but the contrary is true.

[fol. 310] To digress for a moment—as above set out in the Points of Error, respondent Shannon objected to the introduction of the three exhibits because they were irrelevant, but even if their admission should be allowed as going solely to the question of the weight to be given such exhibits, the weight given same should certainly be very small, since the relationship of the freight rates to the profit has no correlation whatsoever. Clearly, Shannon is not promising to deliver for everyone and should not be considered any less a merchant because he hauls the sugar to his establishment by his own trucks rather than paying someone else to do so. It would not seem that the intention of the Interstate Commerce Act was to extend to the case at bar and hold that in view of all of the circumstances Shannon was not a private carrier. Clearly he is. He has a mercantile business and sugar is merely one line of the business. This is also different somewhat from the Stickle case where the only item sold was lumber. Also Stickle had a freight bill with the name and location of the consignee on it, so all he was really doing was delivering, and the consignee had to deliver to the driver a check payable to Stickle for the amount of the transportation charge shown on the freight bill. In our case we have no consignee. We have a purchaser and there is no item of freight connected with the sales price in any way. Instead a sale is made at the market price on credit. As to respondent Wilcox, his



only interest in Shannon's operations is that Wilcox is a broker making a commission on any sale from J. Aron & Co. to Shannon so that the more Shannon buys from J. Aron & Co. the more commission Wilcox makes.

[fol. 311] Division 1 of the Commission seems to give great weight to the fact that Section 203 (c) of the Act was amended in August, 1958, by the addition of the following language "nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purpose unless such transportation is within the scope and in furtherance of a primary business enterprise (other than transportation) of such person. Division 1 mentions that such amendment wrote into the Act the usual "primary business" test. In other words, that such amendment merely codified the prior case law. Division 1 then, however, seems to go a step further and decide that the amendment of the Act could transform a fact situation such as the ease at bar from legitimate private carriage to illegal contract or common carriage. The Shannons submit that the Examiner was imminently correct in his finding "that under the 'primary business' doctrine such transportation constitutes private carriage". Certainly the Shannons are legitimately in the sugar business and the hauling thereof is private carriage.

Appended to the Division's report are both House and Senate Committee hearings concerning the amendment of such Act. An examination of such hearings is most important in the determination of the Committee's intent. Quoting from Appendix B of the Division report it is stated "Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost." It is obvious that what the Committee was attempting to correct by its recommended [fol. 312] amendment to the Act was the prevention of subterfuge in this field and the prevention of prearranged plans to prevent the real consignee receiving transportation at a reduced cost. It is also obvious that the Committee did not intend to recommend the passage of an amendment which was a bona fide merchandising venture such as in the case



at bar where the Shannons are legitimately in the sugar business, where the sale of sugar is part of their primary business enterprise, such item being one of many items that their usual dealership enterprise in San Antonio sells. Certainly, the buying and selling of sugar is no less secondary than the buying and selling of other items handled by the Shannons which have been admitted by all concerned to be a legitimate part of the primary business of the Shannons.

Both of the Committee hearings above referred to make it clear that it was not the intent of such Committees in their recommendation to Congress to change the "primary business test" set out in *Brooks Transportation Co. v. United States*, 340 U. S. 925. As stated in the House Report "there is no intention on the part of the Committee in any way to jeopardize or interfere with bona fide private carriage as recognized in the *Brooks* case. It was even suggested to the Committee that the definition of "private carrier" be changed. In response to this the Committee stated "During the committee's hearings on H. R. 5825, many witnesses expressed the fear that if the definition of a private carrier of property by motor vehicle was changed, it would open the door to reconsideration of the concept of the "primary business" test of private carriage as enunciated by the Commission in the *Lenoir Chair* case (51 M.C.C. 65 (1949)) and by the United States Supreme [fol. 313] Court in the *Brooks* case (*Brooks Transportation Co. v. United States* 340 U.S. 925 (1951)).

In the *Brooks* case, the Supreme Court recognized the so-called primary business test as the governing criterion in establishing bona fide private carriage. Under that doctrine, if transportation is performed in furtherance of the primary business of the operator, even though a charge may be made for such service, the transportation is treated as bona fide private carriage. If, however, a bona fide noncarrier business is not established, the transportation is treated as for hire.

This doctrine has been helpful to the bona fide private carriers. They are fearful that any amendment of the definition of "private carrier of property by motor ve-

hicle" may result in an unsettling of the "primary business" test and require them to embark upon another long series of litigation similar to that which culminated in the Brooks decision."

It is evident from all the committee reports that such committees did not have any intent to jeopardize in any way private carriage and the Shannons submit that the report of Division 1 in this matter does just that. The Shannons believe that such report reads more into the amendment of the Act than was ever intended by its passage by Congress. Certainly, Congress did not intend for individuals, such as involved in the case at bar, to be unable to buy and sell products including sugar when they are and have been for many years in the general mercantile business which is their primary business with sugar being one of several of their commodities bought and sold. There is no evidence whatsoever in the case at bar of "prearranged plans" set up in order that the real [fol. 314] consignee may receive transportation at a reduced cost. The Shannons believe that Congress made its intent when it refused to change the definition of "private carrier" but instead reiterated the fact that it wanted merely to codify the "primary business" test in the Brooks case.

To continue the Bureau in its brief in this matter listed certain cases and the Shannons would like briefly to discuss them.

First, to the case of *L. A. Woiteshek; Common Carrier Application*; 42 MCC 193 (1943); in quoting from that case the Examiner in his recommended report and order on page 4 states:

"In short each case must be determined upon its own particular facts and neither the receipt of compensation for transportation identifiable as such, nor the existing of some noncarrier-business to which the transportation may be incidental is *alone* conclusive."

Based on this holding the Examiner found the respondents to be private carriers and certainly the facts so indicate. Naturally, it is a question of fact to be determined in each

case separately as to whether or not there is private carriage and as the Examiner has found from the evidence respondents have been in business for almost 23 years and never engaged in any important truck operations. That they have a storage facility only in San Antonio and maintain inventories of sugar from which many small sales are made. That only a small portion of the assets of the company are tied up in transportation facilities. That there are no identifiable transportation charges made by respondents to the purchasers of the sugar. Respondents have no basis or formula to determine transportation charges but instead the sales are governed by the market price of sugar in San [fol. 315] Antonio. That respondents do not hold themselves out to the general public to haul sugar for compensation nor was it conclusively shown that respondents transported sugar to sell specific individual orders. That instead respondents are engaged in a bona fide business of buying and selling many items including sugar and that under the very "primary business doctrine" test described in the *Woiteshek* case respondents are private carriers.

In the *Brooks Transportation Company, Inc. vs. U. S.* 93 F. Supp. 517 and 340 U. S. 925, which affirmed *Lenoir Chair Company, Contract Carrier Application* 51 MCC 65 (1949) there does not seem to be any other conclusion after reading such case than to affirm the opinion that the Examiner has reached in the case at bar. Clearly, in the opinion of respondents, the fact-situation there presents a stronger case for the Bureau than in the case at bar yet there private carriage was found. In the *Brooks* case there were actual deliveries to the customers. Here the only transportation is in bringing the goods for purposes of sale to respondents' place of business. Also there is a charge for transportation there included in the selling price but still the holding was private carriage. Here there is no charge for transportation because actually there are no deliveries, the only transportation being respondents bringing the goods back to San Antonio so that they may be sold. Attention is called to the case of *Interstate Commerce Commission vs. Tank Car Oil Corporation* cited in the

Brooks case, 151 F. 2d 834 (CCA-5th Circuit; 1945) where the Court says:

"We think that Congress not only intended to say, but said, that if a person, in good faith, transports his own property for the purpose of sale or in the furtherance of his own commercial enterprise he is a private carrier, and, therefore, not subject to the provisions of the Act."

[fol. 316] The only other case cited by the Bureau is the *Dayhoff* case 8 FCC 32227. From the quotation from the case found on pages 7 and 8 of the Bureau's exceptions it is clear that the fact situations are different in that case and in the case at bar. There, no inventory was kept and the sand was purchased only after receipt of an order and then only to fill that order. Also the major portion of the assets of the company were tied up in motor facilities.

Although the cases seem to indicate that all the facts must be examined for a proper determination of whether or not there is private carriage, the Bureau in its brief seems to believe that the only test is whether or not the profit obtained by the merchant is less than the freight rate of an independent carrier and if so, automatically the merchant is not a merchant at all, but instead is in the transportation business; and this is so even though he has been a merchant for years buying and selling many items of which sugar is only one. Respondents submit that the freight rates are irrelevant in the case at bar. They would certainly have some weight if it were shown that the freight rate was the same as the profit made on the buying and selling of sugar, for then it would appear that the profit obtained was merely for transporting the goods; but when there is no relation whatsoever between the profit obtained and the freight rates, but instead the profit merely varies with the market for the product, it would seem that the freight rate then becomes unimportant. It would seem unusual to say the least, that respondents could bring salt and molasses in their trucks and because they make a larger profit on them they are merchants, but because they happen [fol. 317] to bring sugar in their trucks and the profit margin is smaller that they then are transformed into mem-

bers of the transportation business. In the case at bar respondents are a general merchant handling many products including sugar, which is one of his departments. It would certainly seem strange that if he took on a new line that he could make a large profit on, larger than the freight rate from the place that he purchased the goods to San Antonio, that he is not a common carrier, but because the market price of sugar is lower because possibly it is raised in this part of the country and is easier to obtain, that automatically respondents become transporters. And on close analysis this definitely seems to be the Bureau's argument for their principal, if not, their only contention is that respondents are transporters, not merchants, because of the fact that their margin of profit is less than the freight rate. It would seem to be a factor in determining that respondents were in the transportation business, if for example, they owned a barber shop which was their primary business and then bought a truck that they used to bring a few types of hair oils to their shop but mainly to bring sugar to San Antonio. Here obviously their sugar business is completely unrelated to their main business and their sugar business would necessarily be closely scrutinized, but it is certainly a factor in respondents favor when it is shown that they have been merchants for years slowly expanding their lines to now include, livestock, grain, feed stuffs, salt, molasses, and sugar. Clearly respondents are merchants and nothing else. Also the buying and selling of sugar necessarily entails not only transportation costs but storing costs, collection costs, bookkeeping costs, etc., so that the entire [fol. 318] assets of the business must each bear its proportionate share of the costs as is the case in all mercantile business where similar, but not the same, items are sold.

Respondents would call attention to page 15 of the Bureau's exceptions where the Bureau states:

"It is further evident from this fact and the close proximity of the dates of purchase, loading and delivery, that it was customary for Shannon to have orders from prospective purchasers prior to its purchase of the sugar."



Respondents submit that this statement points the whole question involved in this matter. Shannon testified that he had no such agreements (SF 79) but in spite of this the Bureau believes that Shannon is not telling the truth. In other words, it simply boils down to the fact question, is Shannon a legitimate business man in the sugar business as well as handling many other lines in a general mercantile business, or is he not? Does he really consider himself a sugar merchant buying and selling sugar with the market and attempting to make a profit, or is he not? What else can this question be but a question of fact, and respondents submit that the Examiner who was personally present, heard all of the evidence and the testimony, and after considering same, believed Shannon and found that from all of the facts Shannon intended to be a merchant including the merchandising of sugar and did in fact merchandise sugar bona fide and legitimately. There is actually no evidence to the contrary.

On page 16 of the Bureau's exceptions the Bureau attempts to show that respondents handled sugar differently from its operation of its other activities. Respondents except to this statement by the Bureau. In the first place re- [fol. 319] respondents store all the sugar that it is necessary for them to have on hand taking into consideration availability of storage space, perishability of sugar, etc. Also they use their trucks to transport other items than sugar, and in fact only 3 of the 7 trucks are ever used for transporting sugar (SF 59-60) so that it is definitely in keeping with their business to use trucks for transporting their various types of merchandise. They use them all the time. They do not use rail or common motor carriers to transport the sugar from Louisiana because they can obtain all the sugar they need in their own trucks and obviously the cost is prohibitive. Respondents take issue with page 17 of the Bureau's exceptions discussing the assets of the business. The costs of the sugar part of the business is definitely tied into all or almost all of the assets of the business. There is bookkeeping and office expenses necessarily incident to the purchase and sale of sugar; collecting accounts for sugar requires collection expense which could



include automobile travel to the purchasers of the sugar to collect the money for it and originally contacting those persons possibly in person by automobile to try to sell some sugar. Even the cottage that is mentioned in the Balance Sheet was testified to be taken in for a bad debt (SF 46). The record does not state whether that was a bad debt for a sugar debt or not but inasmuch as a substantial portion of the accounts of the business related to accounts for sugar certainly there is a good chance that the cottage mentioned in the Balance Sheet represented payment for sugar, so that even this item could relate to the sugar phase of the business and shows the inter-relation between the various phases of the business and the fact that this is a mercantile [fol. 320] business with many departments, one of which is sugar, and none of which can be completely segregated from the others. On page 18 of the Bureau's exceptions a discussion is made concerning the sales on credit. Respondents submit that the credit sales are significant even though respondents receive the same credit terms from the sugar refinery as it allows its ultimate purchasers, because even though the discount is on a time basis, since the sugar is purchased first the money is due first to the refinery, and also if the persons to whom respondents sell the sugar do not pay, respondents are still liable to the refinery for the entire purchase price from the refinery, and respondents assets are subject to execution to satisfy that indebtedness.

#### Requested Finding

Respondents Shannon request that the Interstate Commerce Commission find that they are in the business of buying and selling sugar at a profit and that as such their transportation of sugar to San Antonio in their own trucks after the purchase of same from a sugar manufacturer or other sugar dealer without the obtaining of a permit of the Interstate Commerce Commission for them to operate as a common or contract carrier is not violating any of the provisions of the Federal Statutes and more particularly the Interstate Commerce Act or the regulations of the Interstate Commerce Commission, but instead that as to such

operations respondents Shannon are a private carrier as defined in the Interstate Commerce Act.

### Conclusion and Prayer

Wherefore, in view of the above, the Shannons respect- [fol. 321] fully submit that the facts in this case clearly support the Examiner's findings and report and recommended order and that the Shannons are not in violation of any of the provisions of the Interstate Commerce Act or the regulations of the Interstate Commerce Commission, but instead the Shannons are private carriers and as such are operating legitimately. That the Honorable Interstate Commerce Commission should reconsider the report of the Commission by Division 1 and after such reconsideration should hold that the Points of Error Nos. 1 and 2 briefly set out in this petition are in fact errors made by Division 1 in its report and that same should be reconsidered and corrected so that the report of the Interstate Commerce Commission should be that Emma Shannon and Richard J. Shannon dba E. & R. Shannon be held to be not in violation of any of the provisions of the Interstate Commerce Act, or the regulations of the Interstate Commerce Commission, but instead that they are legitimately operating as bona fide private carriers and that the investigation as to them should be discontinued and the previous order ordering them to cease and desist should be cancelled, set aside and held for naught.

Respectfully submitted,

Walter C. Wolff, Attorney for Respondents, James  
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Texas.

[fol. 322] Proof of Service (omitted in printing).

[fol. 323]

BEFORE THE INTERSTATE COMMERCE COMMISSION

INTERSTATE COMMERCE COMMISSION  
Washington, D. C.

No. MC-C-2055

EMMA SHANNON AND OTHERS, INVESTIGATION OF OPERATIONS

ORDER OF AUGUST 3, 1959<sup>1</sup>

NOTICE TO THE PARTIES—September 17, 1959

The outstanding order in the above-entitled proceeding not yet having become effective, and an appropriate petition for reconsideration of such order, by respondent, having been filed on September 8, 1959, such order insofar as it relates to No. MC-C-2055 is stayed pursuant to section 17(8) of the Interstate Commerce Act, pending disposition of the matter.

Harold D. McCoy, Secretary.

[fol. 327]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-2055

In the Matter of

EMMA SHANNON and RICHARD J. SHANNON, doing business  
as E. & R. SHANNON

and

J. T. WILCOX, doing business as  
WILCOX BROKERAGE COMPANY—

INVESTIGATION OF OPERATIONS

<sup>1</sup> The lead number of this report is No. MC-C-1994, *Fraering Brokerage Company, Inc., Investigation of Operations*.

REPLY OF BUREAU OF INQUIRY AND COMPLIANCE TO PETITION  
FOR RECONSIDERATION—Filed September 25, 1959

To the Honorable Interstate Commerce Commission:

Nature of Proceeding:

The titled proceeding, No. MC-C-2055, Emma Shannon and others—Investigation of Operations, was consolidated with No. MC-C-1994, *Fraering Brokerage Company, Inc., Investigation of Operations*, by Division 1, for the purpose of reporting its decision with respect to both investigation [fol. 328] proceedings. The Report and Order, dated August 3, 1959, and served August 11, 1959, found Respondents Shannons and Fraering Brokerage Company, Inc., to be engaged in the transportation of sugar as for-hire carriers without appropriate authority. Fraering procured an extension of time for filing its petition for reconsideration. This replies to the petition filed by the Respondents Shannons.

Preliminary Statement

The pertinent facts have been treated twice by both Respondents Shannons and the Bureau of Inquiry and Compliance in briefs and on exceptions. In particular, the Commission is respectfully referred to the Exceptions to the Examiner's Report by the Bureau and the Report of Division 1. It is unnecessary to burden this record with another review of the facts; however, certain preliminary comments seem appropriate regarding the Petition for Reconsideration.

The points of error in the Petition for Reconsideration generally complain of ultimate conclusions of the Division; however, the arguments of Respondents relate only to contentions heretofore urged by the Bureau and do not specify [fol. 329] error with respect to findings of fact upon which the Division reached its conclusions. In this respect, statements and complaints regarding the facts of the case in the Petition for Reconsideration could be misleading. To illustrate what is meant: Respondents attack a contention heretofore made by the Bureau that the evidence reflects purchases and sales of sugar were made in fulfillment of pre-existing orders. (Petition 22); This was unnecessary;

the Division found on Sheet 16 that "The more usual arrangement under which they operate, however, appears to be one in which the Shannons have *no* pre-existing order, but buy with the intention of selling later either en route or after the transportation is accomplished."

Also, there is a lengthy discussion by Respondents complaining of the Bureau's evidence showing that Respondents realized gross profits from the transportation and sale of representative shipments of sugar substantially less than minimum freight charges of common carriers applicable to the transportation of such shipments. Respondents infer that the Bureau predicated its position entirely on such evidence. (Petition 20). This is not true. The [fol. 330] Bureau says the evidence is pertinent but it has contended that a salient factor in the determination is the purpose for which the transportation is performed. Certainly, there is nothing in the Division's discussion of the case to warrant the assumption that the decision rests entirely on this one fact.

In addition, the claim of Respondents that their profit from the sale of sugar is the normal profit of sugar merchants (Petition 6 & 7) is not true. The Bureau adequately covered this point under Exception No. 3, pages 18 through 20 of the Bureau's Exceptions to the Examiner's Report, on file herein. Also, the Division relates the distinction between the 35 cents per 100 pounds normal profit of sugar dealers in San Antonio *over and above* costs of transportation, as compared with Respondents' average gross profit of 35 cents per 100 pounds *less* costs of operating vehicles more than 500 miles one way. [Sheets 9 & 10]. The conclusion of Respondents that a considerable amount of sugar is warehoused (Petition 8) is unfounded in fact. The Bureau's discussion at page 14 of its Exceptions to the Examiner's Report points out that "inventory" and "storage" were not synonymous. Respondents inventoried sugar which was often on vehicles moving from the refinery and sold off the truck.



[fol. 331]

## Reply to Points of Error Nos: 1 and 2

The finding of the Commission, Division 1, that Respondents Shannons are engaged in the sugar dealings as a related or secondary enterprise with the purpose of profiting from the transportation performed and, as such, they are engaged in the for-hire carriage of sugar as a common or contract carrier, is eminently correct and well supported both in fact and in law.

## Argument and Authorities

Transportation performed as a related or secondary enterprise with the purpose of profiting thereby is inherently antagonistic to bona fides private carriage.

The "primary business doctrine," the established test in determining the status of persons engaged in the transportation of property to which they have taken title under buy and sell arrangements, was incorporated into law by amendment to Section 203(c) of the Act as follows:

... nor shall any person engaged in any other business enterprise transport property by motor vehicle in in-  
[fol. 332] terstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance of, a primary business enterprise (other than transportation) of such person.

A committee analysis of the above-quoted amendment in the Congressional Record of June 11, 1958, reads in part:

This amendment is designed to prevent the use of private, unregulated motor carriers in commercial transportation. These practices usually involve such devices as a private carrier purchasing commodities and then selling them at the other end of the line, when in fact the carrier is actually only transporting the goods similar to a common carrier; or a private carrier transports its own goods to market and then

purchases commodities for the return trip in order to avoid an empty haul. . . .

Reports<sup>1</sup> of Congressional Committees relating to the amendment more specifically denounce the buy and sell practices of private carriers which result in the evasion of the economic provisions of the Act. A portion of Senate Report No. 1647 reads:

The one most commonly used is the so-called buy-and-sell method of operation, involving the issuance of [fol. 333] bills of sale, invoices, and other such instruments to make it appear that the commodities being transported are those of the vehicle owner when in fact the transaction is merely a device to provide transportation for hire without a certificate or permit and without payment of the transportation tax. *Another is the backhaul method of operation increasingly engaged in by concerns that deliver in their own trucks articles which they manufacture or sell and, then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or where they transport property they do not own, such transportation being performed only for the purpose of receiving compensation for the otherwise empty return of their trucks. (emphasis supplied)*

Even prior to the amendment of Section 203(c), this Commission and the courts recognized the following two principles of law: (1) A person may be engaged in more than one business, one of which may be a bona fide trade and the other a motor carrier operation for hire. Stated another way, where, as here, the operator is principally engaged in some noncarrier commercial enterprise, it then must be determined whether the operations in issue are in

<sup>1</sup> Senate Report No. 1647 of the Committee on Interstate and Foreign Commerce.

House Report No. 1922 of the Committee on Interstate and Foreign Commerce.

bona fide furtherance of the primary business or conducted as a related or secondary enterprise with the purpose of profiting from the transportation. *Lenoir Chair Company* [fol. 334] *Contract Carrier Application*,<sup>2</sup> 51 MCC 65, aff. *Brooks Transportation Company, Inc., v. United States*, infra; No. MC-117308, *Roy D. Yiengst Common Carrier Application*, — MCC — (Division 1, November 5, 1958); *Roy J. Vollbracht Contract Carrier Application*, 76 MCC 761. (2) And, in making the determination whether the transportation is in bona fide furtherance of a trade or for-hire carriage, the most significant factor to be considered in the purpose or motive of the operator for engaging in the transportation. *Brooks Transportation Company, Inc., et al., v. United States, et al.*, 93 F. Supp. 517, aff., *per curiam*, 340 U. S. 925. In that case, the lower court, speaking of the primary business doctrine, stated at page 525:

... And, in the application of this test, the *motive to profit by the carriage* and the relationship of the

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<sup>2</sup> In the *Lenoir Case*, The Commission stated in part:

The facts in a given case may show (1) that a concern is engaged in a non-carrier business primarily and that as an incident thereto is transporting property in a bona fide effort to further the primary business and not with any purpose of profiting from the transportation as a separate and distinct enterprise; or (2) that a concern, engaged primarily in a non-carrier business, is also engaged in a related or secondary carrier business supplying transportation for compensation with a purpose to profit from the transportation charge, even though it may be the producer of the goods, their owner while in transit and may be transporting them for the purpose of sale. Thus, although the *Woitishek* decision states that the for-hire or private carrier status of one who engages in transportation shall be determined on the basis of the primary business, it recognizes that a concern may be engaged primarily in a mercantile or manufacturing enterprise of very substantial size and yet so conduct its comparatively much smaller motor operations as to support a finding that such operations are not primarily in furtherance of the main or principal business but are for-hire carriage performed with a purpose to profit from the transportation as such in the same manner as does a for-hire carrier. (emphasis supplied)

carriage to the business involved are important elements. (emphasis supplied)

Respondents argue that their operations more closely resemble those of a private carrier than the operations of Lenoir and Schenley in the *Brooks Case*, supra, and that since the latter operations were held to be private carriage the Commission should likewise hold Respondents' operations [fol. 336] to be private carriage. (Petition 19). However, Respondents misunderstand the significance of the *Brooks Case*. The operations of Lenoir and Schenley were found to be private carriage, despite the fact that each transported products for transportation charges separately assessed and computed at prevailing rates of common carriers, because the transportation was not performed with a purpose to profit thereby, although some profit must certainly have accrued from the charges as computed. In that case, a finding that the transportation was not performed with the purpose to profit overrode facts which might otherwise establish a for-hire motor carrier operation. Contrariwise, transportation performed with a purpose to profit thereby, although certain facts of the operation are indicative of a private carrier operation, is for-hire carriage.

Briefly, the facts of the *Brooks Case* were as follows: Lenoir is a furniture manufacturer having an annual production approximating \$3,000,000, of which only 15% to 20% is transported on its own trucks. Lenoir made all its sales f.o.b. its factory, and when it delivered the furniture in its own vehicles it added to the factory price a charge [fol. 337] comparable to the charges of the rail and motor carriers used by it to haul to the same destinations. The court specifically found that "This is done in order that the delivery price at destination will be the same whether the furniture moves in [Lenoir's] vehicles or is transported by a carrier for hire, and also 'so as not to be unfair competition to any other carrier.'"

The Schenley facts are similar except that its business is the manufacture of alcoholic beverages. The small percentage of beverages hauled in Schenley's own trucks have

charges added to their f.o.b. factory price, which charges are comparable to carrier for-hire charges. *This also was done in order to have uniformity of price and to avoid unfair competition to the regulated carriers.*

Here, beyond question, Respondents Shannons engage in the transportation of sugar for the purpose of providing lading for their vehicles. In the light of the authorities and the legislative history of the amendment to Section 203(c) the Division is eminently correct in concluding that the transportation was performed with the purpose to profit [fol. 338] and, as such, is for-hire carriage subject to the economic provisions of Part II of the Interstate Commerce Act.

Respondents are not engaged in the transportation of sugar in furtherance of the merchandising of sugar.

The testimony of Mr. Shannon, under cross-examination, at pages 82 and 83 of the Record reads:

Q. Well, you stated you could send an empty truck up to Supreme, Louisiana and haul it back for a profit.

A. Yes, sir.

Q. In other words, you don't need to back haul sugar for a profit?

A. What is that?

Q. You don't need—you could operate without any other business, you could send empty trucks up to Supreme, Louisiana right now, and haul sugar back and make a profit on the sale of sugar in San Antonio at the price sugar is selling for now in San Antonio?

A. No, I do not.

Q. Oh, you couldn't?

A. No, I couldn't do that.

Q. But in order to make that profit on the backhaul of sugar you would have to have something going up to Louisiana, would you not, as you stated you couldn't empty truck it up?

A. That's right.



[fol. 339] The Record further discloses that the amount received by Shannon from its customers in excess of what it pays the sugar refinery averages 35.74 cents per hundred pounds. The transportation of sugar by rail, in carload lots, would have cost Shannon 69 cents per hundred pounds, approximately double the amount actually realized from the sale of sugar. Rates assessed by motor carriers for services comparable to that performed by Shannon amounted to 109 cents per hundred pounds for sugar moving in truck load lots, or, more than three times the amount realized by Shannon from its sales. If, as in its other activities, Shannon were to employ for-hire carriers to augment its transportation of sugar, Shannon would be faced with insurmountable losses.

Shannon contends that it is a "sugar merchant" and so urged in its briefs heretofore submitted. However, the uncontroverted evidence is that Shannon cannot profitably engage in the sale of sugar, even when employing its own vehicles to transport the commodities. Actually, Shannon would not be interested in handling sugar except for the fact that it has vehicles, loaded with livestock and feed-[fol. 340] stuffs, moving in the direction of Supreme, Louisiana. It is obvious that Shannon, by its sugar activities, purposes primarily to procure transportation for its vehicles which would otherwise return empty. The transportation is not conducted incidental to and in furtherance of the sale of sugar; on the contrary, the buying and selling of sugar is intended to afford employment for its vehicles.

It appears that Respondents, throughout their argument, assume that their primary business includes the merchandising of sugar and that the transportation of sugar is in furtherance thereof. Actually, this is the issue and not a conceded fact. At page 11 of the Petition, Respondents say they are clearly legitimate sugar merchants, and at page 12 ask:

How else could he be in the business of buying and selling sugar when he does not raise it? He buys sugar from a manufacturer, hauls it to his place of business taking title in his own name and bearing all the losses connected therewith; sells the sugar on credit with the attendant possibility of bad debt loss and in the

interim period stores and inventories the sugar. What more could he do to be considered a legitimate sugar merchant?

It is well established that neither the fact that the technical title to the goods is in the transporter nor the fact [fol. 341] that the transporter assumes risks of damage or loss is controlling in determining the status of the operation. *A. W. Stickle & Co. v. Interstate Commerce Commission*, 128 F. 2d 155; *C. R. Scott v. Interstate Commerce Commission*, 213 F. 2d 300.

At page 22 of the Petition, Respondents ask:

In other words, it simply boils down to the fact question, is Shannon a legitimate business man in the sugar business as well as handling many other lines in a general mercantile business or is he not? Does he really consider himself a sugar merchant buying and selling sugar with the market and attempting to make a profit, or is he not?

Respondents' protestation that they really consider themselves a sugar merchant is not the basis upon which determinations of this nature are made. Furthermore, the beliefs of the Respondents in this respect do not comport with the facts which show that they deal in sugar for a purpose which is wholly different from that of their livestock and feed business.

[fol. 342]

#### Conclusion

The Bureau submits that the points of error are without merit and that the findings and conclusions of the Commission, Division 1, are correct.

Respectfully submitted,

Ellis V. Gregory, Interstate Commerce Commission,  
Washington 25, D. C.;

William W. Guild, Interstate Commerce Commission,  
816 T & P Building, Fort Worth 2, Texas, Attorneys for the Bureau of Inquiry and Compliance.

[fol. 343] Certificate of Service (omitted in printing).

[fol. 344]

BEFORE THE INTERSTATE COMMERCE COMMISSION

ORDER—April 5, 1960

No. MC-C-1994

FRAERING BROKERAGE COMPANY, INC.,  
INVESTIGATION OF OPERATIONS  
(New Orleans, La.)

No. MC-C-2055

EMMA SHANNON AND OTHERS,  
INVESTIGATION OF OPERATIONS  
(San Antonio, Tex.)

Upon consideration of the records in the above-entitled proceeding, and of:

- (1) Petition of Fraering Brokerage Co., Inc., respondent in No. MC-C-1994, filed September 30, 1959, for reconsideration;
- (2) Joint petition of Emma Shannon and Richard J. Shannon, respondents in No. MC-C-2055, filed September 8, 1959, for reconsideration;
- (3) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed October 16, 1959, to the petition in (1) above;
- (4) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed September 25, 1959, to the petition in (2) above;

and good cause appearing therefor:

*It is ordered*, That the said petitions be, and they are hereby, denied, for the reason that the findings of Division I are in accordance with the evidence and the applicable law;

*It is ordered*, That the order of August 3, 1959, as indefinitely postponed with respect to statutory effective and

compliance date, be and it is hereby, reinstated, and the statutory effective and compliance date is hereby fixed as May 23, 1960.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 345]

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. MC-C-2055

EMMA SHANNON AND RICHARD J. SHANNON  
DOING BUSINESS AS E. AND R. SHANNON, ETC.  
—INVESTIGATION OF OPERATIONS

ORDER—June 1, 1960

Postponement of the Effective Date of Order

Present: John H. Winchell, Chairman, to whom the above matter, which is the subject of this order is assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of the institution of an action in the United States District Court for the Western District of Texas entitled *Emma Shannon and Richard J. Shannon, doing business as E. & R. Shannon v. United States et al.*, seeking to set aside the report and order of Division 1 entered August 3, 1959, in the above-entitled proceeding; and good cause appearing therefor:

*It is ordered*, That the effective and compliance date of such order, insofar as it is directed to Emma Shannon and Richard Shannon, doing business as E. & R. Shannon, be, and it is hereby, postponed from May 23, 1960, until further order of the Commission.

Dated at Washington, D. C., this 1st day of June, A. D. 1960.

By the Commission, Chairman Winchell.

Harold D. McCoy, Secretary.

(Seal)

[fol. 347]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

Civil Action No. 2840

[Title omitted]

MOTION OF CERTAIN RAILROADS FOR LEAVE TO INTERVENE ON  
THE SIDE OF DEFENDANTS—Filed November 28, 1960

The following named railroad companies move for leave to intervene in this action, on the side of the defendants, under section 2323, Title 28, U.S. Code:

The Atchison, Topeka and Santa Fe Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Denver and Rio Grande Western Railroad Company; Elgin Joliet and Eastern Railway Company; Great Northern Railway Company; Illinois Central Railroad Company; The Kansas City Southern Railway Company; The Minneapolis & St. Louis Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northern Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Pacific Company; The Texas and Pacific Railway Company; Union Pacific Railroad Company; Wabash Railroad Company; The Western Pacific Railroad Company.

[fol. 348] Movants are corporations and are interested in the questions decided by the Interstate Commerce Commis-



sion which are involved in this action. Movants are common carriers by railroad carrying or participating in the carriage of sugar and other commodities originating or terminating in the area of the operations of the plaintiffs which were found to be unlawful by the Commission. Participation of movants will not broaden the issues or delay the trial and submission of this action.

Attached hereto is a proposed answer setting forth the defense for which intervention is sought.

### Memorandum in Support of Motion

The Commission held that plaintiffs were engaged in the unlawful transportation of sugar by motor vehicle from points in Louisiana to points in Texas and ordered plaintiffs to cease and desist. *Emma Shannon et al., Investigation of Operations*, 81 M.C.C. 337 (1959). The intervening railroads include railroads carrying sugar between such points and railroads receiving sugar by interline from railroads serving such points. The railroads are thus competing with plaintiffs' unlawful transportation of sugar and are interested parties within section 2323. *Alton Railroad Co. v. United States*, 315 U. S. 15, 19 (1942).

Respectfully submitted,

Amos M. Mathews, James W. Nisbet, 280 Union Station Building, Chicago 6, Illinois.

Boyle, Wheeler, Gresham, Davis & Gregory, By Bond Davis, 2100 National Bank of Commerce Building, San Antonio 5, Texas, Attorneys for Movants.

[fol. 349]

[File endorsement omitted]

[fol. 350]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
C.A. No. 2840

EMMA SHANNON and RICHARD J. SHANNON d/b/a  
E. AND R. SHANNON, Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE  
COMMERCE COMMISSION, Defendants.

ORDER ALLOWING INTERVENTION OF CERTAIN RAILROADS ON  
THE SIDE OF DEFENDANTS—November 28, 1960 and En-  
tered November 29, 1960

Before Brown, Circuit Judge, and Rice and Hannay,  
District Judges.

The Motion of certain railroads for leave to intervene on  
the side of defendants having been presented to members  
of the Court in chambers, it is hereby Ordered that leave  
to intervene shall be Granted subject to all legal objections  
which are reserved until the final hearing; briefs shall be  
filed within the time heretofore fixed.

November 28, 1960

Enter: (Illegible)

[fol. 351]

[File endorsement omitted]

[fol. 386]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
Civil Action No. 2840

[Title omitted]

PLAINTIFFS' TRIAL AMENDMENT—Filed September 22, 1961

To the Honorable Judge of Said Court:

Now come the plaintiffs in the above styled and numbered cause, and with leave of court first had and obtained, file this their trial amendment and for same would show unto the court the following:

1.

That in paragraph 5 cumulative of the seven reasons set out that the report and order of the Interstate Commerce Commission are unlawful and void there should be added thereto the following three reasons to be numbered 8 through 10.

8. That the conclusion that plaintiffs are either a common carrier or a contract carrier is too indefinite to satisfy the requirements of the Administrative Procedure Act or due process.

9a. That there are no findings of fact in the record to support a conclusion that plaintiffs are a common carrier.

9b. That there are no findings of fact in the record to support a conclusion that plaintiffs are a contract carrier.

10a. That there is no evidence in the record which would support the findings essential to a conclusion that plaintiffs are a common carrier.

10b. That there is no evidence in the record which would support the findings essential to a conclusion that plaintiffs [fol. 387] are a contract carrier. .

Wolff & Wolff, By Walter C. Wolff, Jr., Attorneys  
for Plaintiffs, 417 South Main Avenue, James K.  
Building, San Antonio, Texas.

[fol. 388] [File endorsement omitted]

[fol. 390]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

San Antonio Division

Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON  
D/B/A E. & R. SHANNON

vs.

UNITED STATES OF AMERICA and  
INTERSTATE COMMERCE COMMISSION

INTERVENORS

RED BALL MOTOR FREIGHT, INC., DENVER-AMARILLO RED BALL  
MOTOR FREIGHT, INC., BROWN EXPRESS, INC., CENTRAL  
FREIGHT LINES, INC., TEXAS-ARIZONA MOTOR FREIGHT,  
INC., REGULAR COMMON CARRIER CONFERENCE OF AMERI-  
CAN TRUCKING ASSOCIATIONS, INC., TEXAS TANK TRUCK  
CARRIERS ASSOCIATION, INC., THE ATCHISON, TOPEKA AND  
SANTA FE RAILWAY COMPANY, CHICAGO & EASTERN IL-  
LINOIS RAILROAD COMPANY, CHICAGO AND NORTH WESTERN  
RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAIL-  
ROAD COMPANY, CHICAGO GREAT WESTERN RAILWAY COM-  
PANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAIL-  
ROAD COMPANY, CHICAGO, ROCK ISLAND AND PACIFIC RAIL-  
ROAD COMPANY, THE DENVER AND RIO GRANDE WESTERN  
RAILROAD COMPANY, ELGIN JOLIET AND EASTERN RAILWAY

COMPANY, GREAT NORTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, WABASH RAILROAD COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY

#### For Plaintiffs

Wolff & Wolff, James K. Building, 417 South Main Avenue, San Antonio, Texas.

[fol. 391]

#### For Defendants

Mr. Ernest Morgan, United States Attorney, Western District of Texas;

Mr. John H. D. Wigger, United States Department of Justice, Washington, D. C.;

Mr. Fritz R. Kahn, Interstate Commerce Commission, Washington, D. C.

#### For Intervenors

Mr. Roland Rice, 618 Perpetual Building, Washington, D. C.;

Mr. Phillip Robinson, 401 Perry-Brooks Building, Austin, Texas;

Mr. Charles D. Mathews, Mr. James H. Keahey, 1020 Brown Building, Austin, Texas;

Mr. Amos M. Mathews, Mr. James W. Nisbet, 280 Union Station Building, Chicago, Illinois;



Mr. Charles E. Crenshaw, Perry-Brooks Building, Austin, Texas;

Boyle, Wheeler, Gresham, Davis & Gregory, National Bank of Commerce Building, San Antonio, Texas.

### Three Judge Court

John R. Brown, United States Court of Appeals, Fifth Circuit, Ben H. Rice, Jr., United States District Court, Western District of Texas, Joe M. Ingraham, United States District Court, Southern District of Texas.

OPINION—April 24, 1963

RICE, Judge

This action is brought against the United States and the Interstate Commerce Commission, pursuant to the [fol. 392] United States Code, Title 28, Sections 1336, 1398, 2284, and 2321-2325, to enjoin, annul, and set aside orders of the Interstate Commerce Commission issued in Docket No. MC-C-2055, *Emma Shannon and others, Investigation of Operations*, holding that plaintiffs have been and are engaging in transportation, in interstate commerce, of sugar as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206(a) or 209(a) of the Interstate Commerce Act, 49 U. S. C. 306(a) or 309(a), and requiring plaintiffs to cease and desist from conducting such unlawful transportation.

This Court has jurisdiction of this cause and there is no question as to venue.

Pursuant to the United States Code, Title 28, Section 2323, intervenors were given leave to intervene in this cause.

By an order dated November 5, 1956, Division 1 of the Interstate Commerce Commission instituted an investigation under Section 204(c) of the Interstate Commerce Act, 49 U.S.C. 304(c), into the activities of plaintiffs for the purpose of determining whether plaintiffs were engaged in transportation of property by motor vehicle as a common or contract carrier without requisite authority, in violation of Sections 206(a) or 209(a) of the Interstate Commerce Act, 49 U.S.C. 306(a) or 309(a). The matter was referred

to an examiner and a hearing was held on March 29, 1957, in San Antonio, Texas.

On August 29, 1957, the report and recommended order of the Examiner was served upon the parties, wherein the Examiner found that the motor carrier operations conducted by plaintiffs were not in violation of the Interstate Commerce Act, and recommended that the proceedings be [fol. 393] discontinued. Exceptions were filed by the Commission's Bureau of Inquiry and Compliance.

On August 3, 1959, Division 1 of the Interstate Commerce Commission found that while the statement of facts in the Examiner's report was adequate in all material respects, that said Examiner was in error as to his conclusions with respect to the nature of the transportation conducted by plaintiffs and the lawfulness thereof. It thereupon refused to adopt the Examiner's recommended order, but instead found that the plaintiffs were engaged in the unauthorized transportation of sugar in violation of the Interstate Commerce Act, and ordered plaintiffs to cease and desist from continuing such unlawful carriage. The Commission denied plaintiffs' petition for a rehearing and on April 5, 1960, ordered plaintiffs to cease and desist said unlawful carriage on or before May 23, 1960, and plaintiffs thereupon instituted this suit.

The basic facts in this proceeding are relatively uncomplicated. Plaintiffs are in the business of buying and selling livestock, in the feed mill business, and also buy and sell corn, oats, wheat, bran, molasses, sugar, salt, fertilizers, and everything in the feed line. Plaintiffs have been in business since about 1934, gradually increasing the number of items bought and sold with sugar being added as a saleable item about the year 1954. The large percentage of plaintiffs' assets are not composed of transportation facilities, nor do the salaries of truck drivers used to drive the trucks that from time to time haul sugar compose as much as twenty-five percent of plaintiffs' average weekly payroll. Plaintiffs purchase sugar in Louisiana in their own name, and haul same to San Antonio, Texas, in their own trucks, are fully responsible for same in the event of its [fol. 394] damage or loss in value because of price fluctua-

tions prior to the sale thereof, and maintain a reasonable inventory of sugar at their place of business in San Antonio. Plaintiffs sell sugar on credit and have sizeable amounts of accounts receivable owed by sugar purchasers. There is no evidence in the record showing that there are any identifiable transportation charges made by plaintiffs to the purchasers of sugar, nor have plaintiffs any basis or formula for assessing transportation charges. There is no evidence in the record showing that plaintiffs hold themselves out to the general public to haul sugar for any compensation, nor that it is plaintiffs' general practice to obtain orders for sugar from its customers prior to purchasing same in Louisiana. The record clearly indicates that plaintiffs are in a general mercantile business buying and selling many items, including sugar.

There is not substantial evidence in the record upon which to base the Interstate Commerce Commission's findings and conclusions, nor is there substantial evidence in the record to indicate that plaintiffs have been and are engaging in transportation, in interstate commerce, of sugar as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206(a) or 209(a) of the Interstate Commerce Act. In so finding and concluding the Interstate Commerce Commission arbitrarily exceeded its legal authority and defendants should be permanently enjoined from enforcing the terms of said order of April 5, 1960, which required and requires plaintiffs to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce found in the [fol. 395] above described report of Division 1 of the Interstate Commerce Commission dated August 29, 1959, to be unlawful, until appropriate authority therefor is obtained. This Court will grant plaintiffs the relief they seek.

Opinion Rendered this 24 day of April, 1963.

John R. Brown, United States Circuit Judge; Joe  
Ingraham, United States District Judge; Ben H.  
Rice, Jr., United States District Judge.

[fol. 396]

[File endorsement omitted.]

[fol. 397]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
Civil Action No. 2840

---

EMMA SHANNON and RICHARD J. SHANNON  
d/b/a E. & R. SHANNON

VS.

UNITED STATES OF AMERICA and INTERSTATE  
COMMERCE COMMISSION et al.

---

JUDGMENT—May 1, 1963

On the 22nd day of September, 1961, in the above entitled and numbered cause came the plaintiffs, defendants, and intervenors, and submitted all matters in controversy to a statutory Three-Judge Court, consisting of Honorable John R. Brown, Judge of the United States Court of Appeals for the Fifth Circuit; Honorable Joe M. Ingraham, Judge of the United States District Court for the Southern District of Texas; and Honorable Ben H. Rice, Jr., Judge of the United States District Court for the Western District of Texas, and the Court having considered the evidence in this cause and the written and oral argument of counsel, finds that plaintiffs are in a general mercantile business buying and selling many items, including sugar, and that there is not substantial evidence in the record upon which to base the Interstate Commerce Commission's findings and conclusions that plaintiffs have been and are engaging in transportation in interstate commerce of sugar as a common or contract carrier by motor vehicle without appropriate authority in violation of Sections 206(a) or 209(a) of the Interstate Commerce Act and that said Interstate Commerce Commission in so finding and concluding arbitrarily

exceeded its legal authority and that consequently the plaintiffs are entitled to the relief for which they pray, and it is, therefore, Ordered, Adjudged and Decreed by this Court [fol. 398] that the Interstate Commerce Commission and the United States of America be and they are hereby permanently enjoined from enforcing the terms of the order of the Interstate Commerce Commission dated April 5, 1960, which required and requires plaintiffs, Emma Shannon and Richard J. Shannon, d/b/a E. & R. Shannon, to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain jointly and severally from all operations in interstate or foreign commerce, found by Division 1 of the Interstate Commerce Commission by report dated August 29, 1959, to be unlawful.

It is further ordered that copies of this order be delivered by the Clerk of this Court to all parties, and that none of the costs herein be taxed against plaintiffs.

Signed and ordered entered this the 1st day of May, 1963.

John R. Brown, United States Circuit Judge; Joe M. Ingraham, United States District Judge; Ben H. Rice, Jr., United States District Judge.

Entered: Civil Order Book Vol. #10, Page 961.

[fol. 399] [File endorsement omitted]



[fol. 400]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON,  
d/b/a E. and R. SHANNON, Plaintiffs,

v.

UNITED STATES OF AMERICA and  
INTERSTATE COMMERCE COMMISSION, Defendants,  
and

RED BALL MOTOR FREIGHT, INC., et al.,  
Intervening Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed June 27, 1963

I.

Notice is hereby given that Red Ball Motor Freight, Inc., and the other intervening defendants identified in Appendix A attached hereto, hereby appeal to the Supreme Court of the United States from the final judgment entered in the action on May 1, 1963.

II.

The clerk will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint, filed May 25, 1960, including Exhibits A, B and C attached thereto.

[fol. 401] 2. Joint answer of the United States of America and the Interstate Commerce Commission, served July 19, 1960.

3. Motion of Red Ball Motor Freight, Inc., et al., for leave to intervene as defendants, served July 25, 1960, including their proposed answer.

4. Motion of Brown Express, Inc., et al., for leave to intervene as defendants, served August 11, 1960, including their proposed answer.

5. Order allowing intervention as defendants, entered August 20, 1960.

6. Motion of certain railroads for leave to intervene as defendants, filed November 28, 1960, including their proposed answer.

7. Order allowing intervention as defendants, entered November 28, 1960.

8. Amendment to complaint, filed September 22, 1961.

9. Record of proceeding before the Interstate Commerce Commission, certified July 25, 1960, including:

a. Order of the Commission, entered November 5, 1956.

b. Order of the Commission, entered February 12, 1957.

c. Transcript of the stenographer's notes of hearing held March 29, 1957, at San Antonio, Texas, and Exhibits 1, 2, and 3, filed at said hearing.

d. Report and order recommended by R. J. Mittelbronn, Hearing Examiner, served August 29, 1957.

e. Report and order of the Commission, filed and entered August 3, 1959.

f. Petition for Reconsideration, filed September 8, 1959.

[fol. 402] g. Notice of the Commission, dated September 17, 1959.

- h. Reply of Bureau of Inquiry and Compliance, filed September 25, 1959.
- i. Order of the Commission, entered April 5, 1960.
- j. Order of the Commission, entered June 1, 1960.
- 10. Stipulation of Facts entered into between plaintiff and intervening defendants, Brown Express, Inc., et al.
- 11. Brief of defendants, Brown Express, Inc., et al.
- 12. Transcript of oral argument before this Honorable Court.
- 13. Opinion, rendered April 24, 1963.
- 14. Judgment, entered May 1, 1963.
- 15. This notice of appeal.

### III.

The following question is presented by this appeal:

Whether the District Court erred in setting aside the Commission's finding that the appellees' transportation of sugar was unauthorized for-hire transportation, rather than bona fide private carriage "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of the appellees, within the meaning of Section 203(c) of the Interstate Commerce Act, where the appellees' "purchase" and transportation of sugar was largely related to the availability of unused capacity on the return movement of their trucks utilized outbound in bona fide private [fol. 403] carriage of other commodities, and where the sugar was usually delivered to the ultimate consumers without warehousing.

Phillip Robinson, 401 Perry-Brooks Building, Austin 1, Texas;

Charles D. Mathews, P.O. Box 858, Austin 65, Texas;

Amos M. Mathews, James W. Nisbet, 280 Union Station Building, Chicago 6, Illinois;

Bond Davis, 2100 National Bank of Commerce Building, San Antonio 5, Texas;

Roland Rice, John C. Bradley, 618 Perpetual Building, Washington 4, D. C.,

Attorneys for Intervening Defendants.

[fol. 404]

### Proof of Service

I, Roland Rice, one of the attorneys for Red Ball Motor Freight, Inc., and the other intervening defendants identified on Appendix A attached hereto, hereby certify that on the 27th day of June, 1963, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties as follows:

(1) On the United States, by mailing copies, properly addressed and postage prepaid, to Hon. Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; to William H. Orrick, Jr., Assistant Attorney General, Department of Justice, Washington 25, D. C.; to John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.; and, airmail postage prepaid, to Ernest Morgan, United States Attorney, San Antonio, Texas.

(2) On the Interstate Commerce Commission, by delivering a copy to Robert W. Ginnane, its General Counsel, and by delivering a copy to Fritz R. Kahn, Associate General Counsel, at their offices in Washington, D. C.

(3) On the plaintiffs, Emma Shannon and Richard J. Shannon, d/b/a E. and R. Shannon, by mailing copies in properly addressed envelopes with first class or airmail postage prepaid as appropriate, to their attorney, Walter C. Wolff, Jr., 417 South Main Avenue, San Antonio, Texas.

(4) On Jefferson D. Giller and Richard L. McGraw, 8th Floor, Bank of the Southwest Building, Houston 2, Texas, [fol. 405] by mailing copies in properly addressed envelopes, airmail postage prepaid.

Roland Rice, 618 Perpetual Building, Washington 4, D. C.

[fol. 406]

## APPENDIX A

The following intervening defendants do hereby participate in this Notice of Appeal:

- (1) Red Ball Motor Freight, Inc.
- (2) Brown Express, Inc.
- (3) Texas-Arizona Motor Freight, Inc.
- (4) Central Freight Lines, Inc.
- (5) The Atchison, Topeka and Santa Fe Railway Company
- (6) Chicago and North Western Railway Company
- (7) Chicago, Burlington & Quincy Railroad Company
- (8) Chicago Great Western Railway Company
- (9) Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
- (10) Chicago, Rock Island and Pacific Railroad Company
- (11) Great Northern Railway Company
- (12) Illinois Central Railroad Company
- (13) The Kansas City Southern Railway Company
- (14) St. Louis-San Francisco Railway Company
- (15) Soo Line Railroad Company
- (16) Union Pacific Railroad Company
- (17) Wabash Railroad Company
- (18) The Western Pacific Railroad Company
- (19) Texas Tank Truck Carriers Association, Inc.
- (20) Regular Common Carrier Conference of American Trucking Association, Inc.

[fol. 407]

[File endorsement omitted]



[fol. 408]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
Civil Action No. 2840

---

EMMA SHANNON and RICHARD J. SHANNON,  
d/b/a E. and R. Shannon, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE  
COMMERCE COMMISSION, Defendants,

and

RED BALL MOTOR FREIGHT, INC., et al.,  
Intervening Defendants.

---

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed July 1, 1963

I.

Notice is hereby given that the United States of America and the Interstate Commerce Commission, defendants in the above-styled civil action, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on May 1, 1963.

This appeal is taken pursuant to 28 U.S.C. §§1253 and 2101(b).

II.

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Complaint, filed May 25, 1960, including Exhibits A, B and C attached thereto.

[fol. 409] 2. Order designating a Three-Judge Court, entered May 30, 1960.

3. Joint Answer of the United States of America and the Interstate Commerce Commission, filed July 21, 1960.

4. Motion of Red Ball Motor Freight, Inc., et al., for leave to intervene as defendants, filed July 26, 1960, including their proposed answer.

5. Motion of Brown Express, Inc., et al., for leave to intervene as defendants, filed August 12, 1960; including their proposed answer.

6. Opposition to Motion of Red Ball Motor Freight, Inc., et al., filed August 15, 1960.

7. Opposition to Motion of Brown Express, Inc., et al., filed August 19, 1960.

8. Order allowing intervention as defendants, signed August 20, 1960, and entered August 24, 1960.

9. Motion of certain railroads for leave to intervene as defendants, filed November 28, 1960, including their proposed answer.

10. Order allowing intervention as defendants, signed November 28, 1960, and entered November 29, 1960.

11. Order substituting Judge Joe M. Ingraham for Judge Allen B. Hannay, entered July 31, 1961.

12. Plaintiff's trial amendment, filed September 22, 1961.

13. Record of proceeding before the Interstate Commerce Commission, certified July 25, 1960, including:

a. Order of the Commission, entered November 5, 1956.

b. Order of the Commission, entered February 12, 1957.

[fol. 410] c. Transcript of the stenographer's notes of hearing held March 29, 1957, at San Antonio, Texas, and Exhibits 1, 2, and 3, filed at said hearing.

d. Report and order recommended by R. J. Mittlebrown, Hearing Examiner, served August 29, 1957.

- e. Report and order of the Commission, filed and entered August 3, 1959.
- f. Petition for Reconsideration, filed September 8, 1959.
- g. Notice of the Commission, dated September 17, 1959.
- h. Reply of Bureau of Inquiry and Compliance, filed September 25, 1959.
- i. Order of the Commission, entered April 5, 1960.
- j. Order of the Commission, entered June 1, 1960.
- 14. Opinion, rendered April 24, 1963.
- 15. Judgment, entered May 1, 1963.
- 16. This notice of appeal.

### III.

The following question is presented by this appeal: Whether the District Court applied the wrong standard for determining, under section 203(c) of the Interstate Commerce Act, whether motor transportation is "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of the carrier and thus is private rather than for-hire transportation.

William H. Orrick, Jr., Assistant Attorney General;

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Ernest Morgan, United States Attorney, San Antonio 6, Texas,

Attorneys for the United States of America.

[fol. 411] Robert W. Ginnane, General Counsel;

Fritz R. Kahn, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.,

Attorneys for the Interstate Commerce Commission.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 412]

[File endorsement omitted]

[fol. 418] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 420]

SUPREME COURT OF THE UNITED STATES

No. 406 & 421, October Term, 1963

---

RED BALL MOTOR FREIGHT, INC., et al., Appellants,

vs.

EMMA SHANNON, et al., etc.; and

UNITED STATES AND INTERSTATE COMMERCE  
COMMISSION, Appellants,

vs.

EMMA SHANNON, et al., etc.

---

ORDER NOTING PROBABLE JURISDICTION—November 12, 1963

Appeals from the United States District Court for the Western District of Texas.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allowed for oral argument.

**AUG 26 1963**

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1963

No. **406**

**RED BALL MOTOR FREIGHT, INC., ET AL., Appellants,**

**v.**

**EMMA SHANNON AND RICHARD J. SHANNON, d/b/a  
E. AND R. SHANNON, Appellees.**

Appeal From The United States District Court For The  
Western District Of Texas, San Antonio Division

**STATEMENT AS TO JURISDICTION**

**PHILLIP ROBINSON**  
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618 Perpetual Building  
Washington 4, D. C.

*Attorneys for Appellants*

**August 26, 1963**



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962

\_\_\_\_\_  
No.  
\_\_\_\_\_

RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants*,

v.

EMMA SHANNON AND RICHARD J. SHANNON, d/b/a  
E. AND R. SHANNON, *Appellees*.

\_\_\_\_\_  
Appeal From The United States District Court For The  
Western District Of Texas, San Antonio Division

\_\_\_\_\_  
**STATEMENT AS TO JURISDICTION**

\_\_\_\_\_  
**OPINIONS BELOW**

The District Court's opinion is published in F. Supp. \_\_\_\_\_, the report of the Interstate Commerce Commission in 81 M.C.C. 337. The United States and the Commission are taking a joint appeal from the same judgment from which this appeal is taken, and the copy of the District Court's opinion to be attached to their jurisdictional statement is incorporated herein by reference.

### NATURE OF THE PROCEEDING

This action was brought by appellees in the District Court under 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, to set aside an order of the Interstate Commerce Commission.

### JUDGMENT BELOW

The District Court's final judgment setting aside the order was dated and entered May 1, 1963. Notice of appeal was filed in that Court by these appellants June 27, 1963.

### STATUTORY BASIS FOR JURISDICTION

Jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U.S.C. §§ 1253, 2101(b).

### CASES SUSTAINING JURISDICTION

The following cases sustain this Court's jurisdiction: *Interstate Commerce Commission v. J-T Transport Co.*, 368 U.S. 81 (1961); *American Trucking Associations v. United States*, 355 U.S. 141, 153 (1957); *Alton Railroad Company v. United States*, 315 U.S. 15, 18-20 (1942).

### STATUTES INVOLVED

National Transportation Policy  
49 U.S.C. preceding §§ 1,  
301, 901 and 1001

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe,

adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.”

Section 203(c) of the Interstate Commerce Act (49 U.S.C. 303), 72 Stat. 568, 574.

“Except as provided in section 202 (c), section 203 (b), in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.”

### QUESTION PRESENTED

Whether the District Court erred in setting aside the Commission's finding that the appellees' transportation of sugar was unauthorized for-hire transportation, rather than bona fide private carriage "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of the appellees, within the meaning of Section 203(c) of the Interstate Commerce Act, where the appellees' "purchase" and transportation of sugar was largely related to the availability of unused capacity on the return movement of their trucks utilized outbound in bona fide private carriage of other commodities, and where the sugar was usually delivered to the ultimate consumers without warehousing.

### STATEMENT OF THE CASE

The Commission instituted on its own motion an investigation of appellees' operations. After hearing, the Commission found that appellees were engaging without authority as interstate motor common or contract carriers of sugar and ordered them to cease and desist. Upon suit by appellees the District Court set aside the order, and from that judgment separate appeals have been taken (1) by the United States and the Commission and (2) by these appellants.

Appellants are authorized motor common carriers of property, railroads, and two associations of motor common carriers.\* They were permitted to intervene in the District Court in support of the Commission's order under 28 U.S.C. § 2323. As originating or connecting lines the common carriers are engaged in hauling sugar in the area of appellees' sugar transportation operations.

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\*Appellants are listed in Appendix A.

Appellees have an office and warehouse at San Antonio, Texas, where they have been engaged for many years in buying and selling livestock, grain, fertilizer, molasses, and salt. In connection with this business they operate seven trucks, carrying these commodities to and from their warehouse and making some deliveries to customers. These truck operations are not in controversy. (81 M.C.C. p. 341).

After transportation of livestock in their own trucks to southern Louisiana, appellees since 1954, have been purchasing sugar, in 100-pound bags, from a refinery at Supreme, also in southern Louisiana, and transporting and selling it to purchasers, the majority of whom are located in San Antonio. The distance from Supreme to San Antonio is 525 miles. All purchases from the refinery are made on credit, subject to a 2 per cent discount if payment is made within 10 days, and the sales by appellees at San Antonio are made on the same terms. The sugar is customarily loaded at the refinery and moved directly to and unloaded at the purchasers' places of business. Appellees' sugar sales are usually made after the sugar is en route from Louisiana, but whenever sugar transportation is not coordinated with a truck movement from San Antonio to Louisiana the sugar transportation is performed to fill an order obtained in advance. Sometimes appellees employ motor common carriers to haul commodities they handle, but they have never used common carriers to haul sugar. (id. pp. 341-342). Appellees admit that their principal reason for purchasing sugar in Louisiana is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio. (id. pp. 343, 346).



### THE QUESTION PRESENTED IS SUBSTANTIAL

This case brings to the Court for the first time the construction and application of the 1958 amendment to § 203(c) of the Interstate Commerce Act, 49 U.S.C. § 303(c), 72 Stat. 568, 574. Section 203(c), with the 1958 amendment in italics, is the following:

"Sec. 203. (c) Except as provided in section 202 (c), section 203 (b), in the exception in section 203 (a) (14), and, in the second proviso in section 206 (a) (1), no person shall engage, in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, *nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.*"

The District Court ignored § 203(c), did not apply it and made no comment upon it, despite the plain fact that it was intended to prevent evasion of the licensing provisions of the Act by the use of the buy and sell type of operations employed by appellees here. As this Court observed in *United States v. Drum*, 368 U.S. 370, 375 note 12 (1962), the amendment was "designed to curb so-called 'buy-sell' evasions by purported or 'pseudo' private carriers. \* \* \* See S. Rep. No. 1647, 85 Cong., 2d Sess. 23-24; H.R. Rep. No. 1922, 85th Cong., 2d Sess. 17-19."

The Transportation Act of 1958, embracing, among others, the instant amendment to the Interstate Com-

merce Act, was designed to aid the nation's common carrier system. Speaking of the bill which became law the House Committee Report<sup>1</sup> said, "The purpose of this bill is to amend the Interstate Commerce Act in order to strengthen and improve our nation's common carrier surface transportation system so that it may better fulfill its roll in meeting the transportation needs of the nation's expanding economy and the requirement of national defense."

And commenting upon that section of the 1958 Act which added the language here at issue, the Report<sup>2</sup> used this significant language:

"The erosion of traffic of regulated carriers has also been caused to a considerable extent by the growth of 'pseudo-private carriage' by truck. One of the subterfuges most commonly used in this type of carriage is the 'buy-and-sell' arrangement, whereby fictitious bills of sale and invoices are used to make it appear that the commodities being transported by truck are those of the vehicle owner and operator and that the transportation involved is private carriage. The real business of persons engaged in this type of operation is, in fact, transportation, and the movement of goods performed by them is not in furtherance of any primary, or bona fide business enterprise other than transportation.

"In addition, businesses which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others. Such transportation is usually

<sup>1</sup> HR Rep. No. 1922, 85th Cong., 2d Sess., P. 2.

<sup>2</sup> Id., P. 17-18.

performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost.

"This pseudo-private carriage is a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act. It constitutes a growing menace to shipper and carrier alike, and is not in the public interest. It is injurious to sound public transportation. It promotes discrimination between shippers and threatens the existing rate structures of regulated carriers. It makes possible the avoidance of payment of the Federal transportation of property tax, for this tax is not levied on the transportation of property owned by the carrier."

It is clear that appellees' carriage of sugar is a transportation business. It is a steady stream of transportation from manufacturer direct to user. (81 M.C.C. p. 342).

Such transportation business is not "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of appellees. Appellees have a non-transportation "primary business enterprise" at San Antonio and they perform certain truck transportation within its scope and in furtherance of it. But the sugar transportation is a separate business, and is a transportation business. In actuality the only service appellees perform in respect to sugar is transportation. It would be hard to devise a clearer violation of § 203 (c) than this.

The interest of the nation's common carriers, recognized by Congress in the 1958 amendment to the Inter-

state Commerce Act, is involved. The public concern manifested by Congress has been given no consideration by the Court below and warrants careful measurement in determining the status of the transportation involved.

The District Court did not take into consideration the clear evidence that the sugar transportation is a separate enterprise, which is wholly transportation. Instead, the Court lumped the San Antonio warehouse-dealer business and the sugar transportation together in total disregard of § 203 (c) whose language compels that they be considered separately.

### CONCLUSION

The question presented is so substantial as to require plenary consideration by the Court.

Respectfully submitted,

PHILLIP ROBINSON  
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Austin 1, Texas

CHARLES D. MATTHEWS  
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JOHN C. BRADLEY  
618 Perpetual Building  
Washington 4, D. C.

*Attorneys for Appellants*

August 26, 1963

## APPENDIX A

The following intervening defendants do hereby participate in this Jurisdictional Statement:

- (1) Red Ball Motor Freight, Inc.
- (2) Brown Express, Inc.
- (3) Texas-Arizona Motor Freight, Inc.
- (4) Central Freight Lines, Inc.
- (5) The Atchison, Topeka and Santa Fe Railway Company
- (6) Chicago and North Western Railway Company
- (7) Chicago, Burlington & Quincy Railway Company
- (8) Chicago Great Western Railway Company
- (9) Chicago, Milwaukee, St. Paul and Pacific Railroad Company
- (10) Chicago, Rock Island and Pacific Railroad Company
- (11) Great Northern Railway Company
- (12) Illinois Central Railroad Company
- (13) The Kansas City Southern Railway Company
- (14) St. Louis-San Francisco Railway Company
- (15) Soo Line Railroad Company
- (16) Union Pacific Railroad Company
- (17) Wabash Railroad Company
- (18) The Western Pacific Railroad Company
- (19) Texas Tank Truck Carriers Association, Inc.
- (20) Regular Common Carrier Conference of American Trucking Associations, Inc.



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# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, ET AL. APPELLANTS

v.

EMMA SHANNON AND RICHARD J. SHANNON, D/B/A  
E. AND B. SHANNON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF TEXAS—SAN ANTONIO DIVISION

## JURISDICTIONAL STATEMENT

### OPINIONS BELOW

The opinion of the district court is not yet reported. The opinion, together with the court's judgment, is reproduced in Appendix I, *infra*, pp. 1a-6a. The report of the Interstate Commerce Commission is reported at 81 M.C.C. 337, and, together with its orders, is reproduced in Appendix II, *infra*, pp. 7a-34a.<sup>1</sup>

### JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284 and 2321-2325 to set aside orders of the Inter-

<sup>1</sup> The report and orders were consolidated with those in Docket No. MC-C-1994, *Fraering Brokerage Co., Inc. Investigation of Operations*, not involved here.

state Commerce Commission. The judgment of the district court, *infra*, pp. 5a-6a, was entered May 1, 1963, and on July 1, 1963, the United States of America and the Interstate Commerce Commission filed their notice of appeal. The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *United States v. Drum*, 368 U.S. 370.

#### STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, 49 U.S.C. 301, *et seq.*, are set forth in Appendix III, *infra*, pp. 35a-37a.

#### QUESTION PRESENTED

Whether the district court applied the wrong standard for determining, under Section 203(c) of the Interstate Commerce Act, whether motor transportation is "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of a carrier and thus is private rather than for-hire transportation.

#### STATEMENT

This case grows out of a proceeding instituted by the Interstate Commerce Commission to determine whether the appellees' motor transportation of sugar constituted carriage for-hire rather than private carriage, and therefore was illegal because performed without operating authority from the Commission.

1. The appellees, a partnership, are engaged in the business of buying and selling livestock and other goods. Their business headquarters and a warehouse



are in San Antonio, Texas. The business includes dealing in fertilizer, feed-grains, molasses and salt—and since 1954, in sugar. On shipments of livestock and other related items—but not sugar—the appellees have used common carriage to some extent. They also operate seven trucks; and it is conceded that in transporting items other than sugar the appellees are acting in furtherance of their principal business enterprise and are engaged in lawful private carriage (App. II, *infra*, p. 14a).

The appellees' dealings in sugar, begun in 1954, were developed to provide return cargo for their trucks which have made deliveries of livestock or other merchandise to customers at or near the site of a sugar refinery at Supreme, Louisiana, about 525 miles from San Antonio. The sugar is bought when one of their trucks which has made such a delivery would otherwise return empty to San Antonio. Usually, the sugar is sold by the appellees while it is in transit from the refinery or within a day or two of the date on which it is picked up. Most of the sugar is handled in truckload lots and is sold and delivered directly to ultimate consumers in the San Antonio area, without processing or warehousing by the appellees. Approximately half a truckload of sugar is kept on hand and sold from the warehouse in small lots of from 1 to 25 bags. The appellees maintain their warehouse primarily for the processing or storage of grains, feeds or fertilizers. (App. II, *infra*, pp. 14a-16a.)

Appellees make a gross average profit of about 35 cents per hundred pounds on each truckload of sugar

they handle. The respective rail and truck rates for transportation of sugar between the same points are 69 cents and \$1.00. (App. II, *infra*, pp. 15a-16a.)

2. The Commission held that the appellees' transportation of sugar constituted for-hire rather than private carriage and ordered them to cease and desist therefrom unless and until they obtained appropriate operating authority. It pointed out (App. II, *infra*, p. 16a) that under Section 203(c) of the Interstate Commerce Act the touchstone for determining whether transportation conducted by someone whose primary business is not transportation is "whether the operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed." Noting that the appellees "admit that their principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio, and that in order to make a profit on the backhaul of sugar they would have to have something moving to Louisiana from San Antonio" (*id.* at 21a),<sup>2</sup> the Commission stated (*id.* at 22a-23a):

\* \* \* We are satisfied that the purpose of their buying and selling sugar and the transportation thereof from Supreme to certain points in Texas is to reduce the cost of transporting other commodities outbound from San Antonio. Such re-

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<sup>2</sup> The Commission noted that where sugar transportation was not coordinated with backhauls, the transportation was to fill an especially profitable order obtained in advance (App. II, *infra*, p. 15a).

duction of the cost of transportation of the other commodities constitutes a profit from the transportation of sugar from Supreme to the Texas points, and we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such. Inasmuch as their transportation of sugar makes their transportation of other commodities in the opposite direction more profitable, to this extent, it is an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which their transportation of other commodities is performed. But it can, at most, be considered to be in furtherance of certain lawful private transportation operations of the Shannons, and only secondarily related to their primary business, which, again, is a noncarrier commercial enterprise. Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required; and we so find.

3. The district court set aside the order on the ground that the finding that the appellees had engaged in for-hire carriage was not supported by substantial evidence. The court stated (App. I, *infra*, pp. 3a-4a) that the appellees were engaged in the business of buying and selling goods; that most of their assets and weekly payroll were devoted to non-transportation operations; that they took title to the

sugar, bore the risk of loss, made sales on credit and maintained an inventory; that they did not hold themselves out to the general public as for-hire carriers; and that there were no identifiable transportation charges to purchasers of sugar. The court did not refer to Section 203(c), and did not discuss the facts upon which the Commission based its determination that the appellees' backhaul transportation of sugar was not within the scope and in furtherance of a primary business enterprise other than transportation.

#### THE QUESTION IS SUBSTANTIAL

This appeal presents a substantial question concerning the criteria under Section 203(c) of the Interstate Commerce Act for determining when motor transportation constitutes private rather than for-hire carriage. In recent amendments to the Act, Congress has defined and limited the permissible scope of private motor carriage which may be undertaken without Commission operating authority. Section 203(c), which was added to the Act in 1957, prohibited engaging in "for-hire transportation" without such authority.<sup>2</sup> In the Transportation Act of 1958, 72 Stat. 574,

<sup>2</sup> Section 203(c), as added by Section 2 of Public Law 85-163, 71 Stat. 411, provided as follows:

"Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or

Section 203(c) was amended to add a prohibition on any person "engaged in any other business enterprise" from transporting property "by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance of a primary business enterprise (other than transportation) of such person" (App. III, *infra*, p. 36a).

1. The purpose of the 1958 amendment was to eliminate what Congress regarded as "pseudo-private carriage," characterized by "subterfuges" to evade economic regulation and avoid imposition of the transportation excise taxes. H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 17-18; S. Rep. No. 1647, 85th Cong., 2d Sess., pp. 5, 23. The Senate Committee (*id.* 24) explained that one common technique was the "so-called buy-and-sell method," in which papers are prepared "to make it appear" that the commodities belong to the owner of the vehicle; and that another increasingly-used device was "the backhaul method of operation" involved in this case. By this means—

\* \* \* concerns that deliver in their own trucks articles which they manufacture or sell \* \* \* then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or \* \* \* they transport property they do not own, such transportation being performed only

a permit issued by the Commission authorizing such transportation." See S. Rep. 703, 85th Cong., 1st Sess., pp. 6, 7-8 (1957); H. Rep. 970, 85th Cong., 1st Sess., pp. 4, 9 (1957).



for the purpose of receiving compensation for the otherwise empty return of their trucks.\*

The 1958 amendment was intended to prohibit both of these disguised methods of for-hire transportation—backhaul buy-sell operations auxiliary to lawful private carriage and spurious buy-sell arrangements. As the Senate Committee explained (S. Rep. No. 1647 at pp. 24-25):

With the Interstate Commerce Act amended in this way commercial highway transportation of property in interstate or foreign commerce would, with certain specific exemptions, be required to fall into one or another of three classes: (a) duly certificated common carriage, (b) duly permitted contract carriage or (c) transportation solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter. Other commercial highway transportation, ex-

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\*Similarly, the House report (H. Rep. 1922, 85th Cong., 2d Sess., pp. 17-18) identified two types of "pseudo-private carriage" which it sought to prohibit as being "a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act." The first was the fictitious buy-sell arrangement. The second was the backhaul buy-sell here involved, described as follows (*id.* 18):

"In addition, businesses which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, pre-arranged plans are set up in order that the real consignee may receive transportation at a reduced cost."



cept as specifically provided, would be prohibited. This, it is believed, would serve to correct most of the abuses that have arisen in the name of private carriage and yet would not in any way jeopardize or interfere with what might be called legitimate or bona fide private carriage. Indeed the 'primary business test' contained in *Brooks Transportation Co. v. U.S.* (340 U.S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute.

In the *Brooks Transportation* case, two chair manufacturers transported their products in their own trucks, and wherever possible used such vehicles on the return movement to haul manufacturing materials for their own use. The Commission held that the delivery of goods, and the backhaul, were lawful private carriage because undertaken "in bona fide furtherance of the primary business" of manufacturing chairs and not "conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed." *Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. 65, affirmed, *Brooks Transportation Co. v. United States*, 93 F. Supp. 517, 522 (E.D. Va.), affirmed, 340 U.S. 925. See also, H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 18-19.

In sum, the 1958 amendment made it clear that transportation performed by someone primarily engaged in a non-transportation business is for-hire carriage unless it is within the scope and in further-

ance of the "primary [non-transportation] business" and that the sale of goods engaged in solely to take advantage of a backhaul cannot qualify as such a primary business. In other terms, the inquiry is whether the transportation is undertaken to profit therefrom or to further a nontransportation enterprise.

2. The district court, without considering whether the Commission properly applied the primary business test in this case, set aside the Commission's finding that appellees' transportation of sugar constituted for-hire carriage as not supported by substantial evidence. Although this ruling purportedly rests on the sufficiency of the evidence, it in fact constitutes a rejection of the primary business test which Congress wrote into the statute in the 1958 amendment.

The determination whether the appellees' transportation of sugar was private or for-hire carriage does not depend, as the district court believed, upon such factors as whether they held themselves out to provide transportation service, whether they had an extensive investment in transportation equipment and facilities, whether they dealt in other goods, and whether they took title to and assumed certain risks in connection with the sugar. These facts would be pertinent if the appellees' bona fide ownership of the sugar had been challenged. Here, however, the question whether the transportation was incident to and in furtherance of the appellees' "primary business of buying and selling livestock and certain other commodities" (App. II, *infra*, p. 23a) must be answered in the light of the intent of Congress in Section 263(c) to prevent the use of the "backhaul method of operation"

as a means of escaping economic regulations (see *supra*, p. 7). Appellees admitted that "their principal reason for purchasing sugar at Supreme is to provide a backhaul \* \* \* and that in order to make a profit on the backhaul of sugar they would have to have something moving to Louisiana from San Antonio" (App. II, *infra*, p. 21a). In view of this admission and the other evidence in the record respecting the appellees' sugar operations (see the Statement, *supra*, pp. 3-5), the Commission was fully warranted in concluding that their purpose in buying and transporting the sugar "is to reduce the cost of transporting other commodities outbound from San Antonio," and that such reduction in the cost of transporting the other commodities "constitutes a profit from the transportation of sugar \* \* \* [which] is undertaken for the purpose of profiting from the transportation as such" (App. II, *infra*, p. 22a). The Commission thus correctly held that appellees were engaging in for-hire transportation in their sugar operations.

In *Church Point Wholesale Beverage Co. v. United States*, 200 F. Supp. 508 (W.D. La.), another district court recently upheld a Commission finding that similar back-haul transportation of sugar, designed "to provide a revenue-producing northbound movement in connection with a southbound movement of merchandise for the plaintiffs' wholesaling operations [its primary business]" (200 F. Supp. at 512), constituted for-hire rather than private carriage. The court, after discussing the primary business test of Section 203(c), concluded (p. 517) that "this economic benefit accruing to the noncarrier business enterprise of the plaintiffs is too remote to place such transportation within the regulatory exemption afforded private car-

riage by the Act. \* \* \* Plaintiffs' justification of their northbound transportation would make a nullity of the primary business test expounded by the Commission, sustained by the courts and ratified by the Congress in the enactment of Section 203(c) of the Act, for it would permit any person engaged in any other business enterprise to transport property by motor vehicle, irrespective of whether such transportation is, in fact, within the scope or in furtherance of such person's primary business enterprise, if the performance of the transportation makes possible more profitable utilization of the equipment used in the primary business enterprise." See also, *Cahaba Steel Co. v. United States*, S.D. Ala., Civil Action No. 2669, decided January 17, 1962, where the court *per curiam* affirmed a Commission ruling that a wholesaler engaged in for-hire transportation by conducting a like back-haul operation. The wholesaler, after delivering his goods in his own trucks, "to avoid an empty return haul," purchased other goods, hauled them back to his point of origin, and there sold them; the evidence in that case, as in the present case, "show[ed] an intention to profit from the return transportation as such \* \* \*". (*Cahaba Steel Co.—Investigation of Operations*, 86 M.C.C. 759, 764-765).

3. The question of the criteria under Section 203(c) for distinguishing between private and for-hire carriage is important in the administration of the Interstate Commerce Act and the regulation of the transportation industry. Unregulated motor carrier op-

erations are very substantial.\* As this Court pointed out in *United States v. Drum*, 368 U.S. 370, 375, the requirement of Commission operating authority before a new motor carriage service may be commenced "bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market." As *Drum* further noted, this same concern underlies the statutory provisions limiting and defining the scope of exempt private carriage. The use of buy-sell arrangements for evasion or avoidance of the regulatory program of the Interstate Commerce Act has been and currently is a serious and vexatious problem.

Backhaul buy-sell operations like appellees', together with sham buy-sell arrangements and the sham leasing involved in *Drum*, are the most prevalent means by which unauthorized operations have been carried on under the guise of private carriage. The continuing concern of the Commission with the practice involved in this case is reflected in its annual reports<sup>5</sup> and led it to recommend to Congress the

<sup>5</sup> The *Report on National Transportation Policy, Special Study Group on Transportation Policies in the United States* for the Senate Committee on Interstate and Foreign Commerce, 87th Cong., 1st Sess. (the Doyle Report), p. 50, estimated that the percentage of motor carrier ton-mile traffic for 1958 handled by unregulated motor carriers was 68 percent.

<sup>6</sup> In its Sixty-Seventh Annual Report (1953), at p. 55, the Commission said:

"Merchandising by motortruck, whether actual or pretended, over long distances is increasing to such an extent that it is becoming a major factor in the transportation of freight between distant points. Manufacturers and mercantile establish-



legislation which became Section 203(c)' and its 1958 amendment.' Buy-and-sell operations of the type involved in this case, which the district court's decision sanctions, continue to be a serious enforcement problem for the Commission.'

#### CONCLUSION

This appeal presents a substantial question involving a matter of public importance in the administrations, which deliver in their own trucks articles which they manufacture or sell, are increasingly purchasing merchandise at or near their point of delivery and transporting such articles to their own terminal for sale to others. Such transportation is performed for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other cases, arrangements are made with the consignee of such merchandise for the 'buy-and-sell' arrangement in order that the consignee may receive transportation at a reduced cost." See also Sixty-Eighth Annual Report (1954), p. 5; Sixty-Ninth Annual Report (1955), p. 99; Seventieth Annual Report (1956), p. 161; Seventy-First Annual Report (1957), p. 137.

' Hearings on S. 1384, etc., Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., pp. 25-26.

\* Hearings on Problems of the Railroads before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 1832 (1958); Hearings on Railroad Problems before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 109 (1958).

\* Seventy-Sixth Annual Report (1962), p. 63. Since July 1, 1962, the Commission has begun nine investigation proceedings involving alleged buy-and-sell operations. During the three preceding years, the Commission ordered 16 buy-and-sell operations discontinued. Additionally, during the 12-month period ending December 31, 1962, the Commission successfully concluded eight criminal or civil enforcement cases arising from unauthorized buy-and-sell operations.



tion of the Interstate Commerce Act. Probable jurisdiction should be noted.

Respectfully submitted.

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AUGUST 1963.

## APPENDIX I

In the United States District Court for the Western  
District of Texas, San Antonio Division

Civil Action No. 2840

EMMA SHANNON AND RICHARD J. SHANNON  
D/B/A E. & R. SHANNON

v.s.

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION

Three-judge court: JOHN R. BROWN, United States Court of Appeals, Fifth Circuit; BEN H. RICE, JR., United States District Court, Western District of Texas; JOE M. INGRAHAM, United States District Court, Southern District of Texas.

RICE, *Judge*: This action is brought against the United States and the Interstate Commerce Commission, pursuant to the United States Code, Title 28, Sections 1336, 1398, 2284, and 2321-2325, to enjoin, annul, and set aside orders of the Interstate Commerce Commission issued in Docket No. MC-C-2055, *Emma Shannon and others, Investigation of Operations*, holding that plaintiff have been and are engaging in transportation, in interstate commerce, of sugar as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206(a) or 209(a) of the Interstate Commerce Act, 49 U.S.C. 306(a) or 309(a), and requiring plaintiffs to cease and desist from conducting such unlawful transportation.

This Court has jurisdiction of this cause and there is no question as to venue.

Pursuant to the United States Code, Title 28, Section 2323, intervenors were given leave to intervene in this cause.

By an order dated November 5, 1956, Division 1 of the Interstate Commerce Commission instituted an investigation under Section 204(c) of the Interstate Commerce Act, 49 U.S.C. 304(c), into the activities of plaintiffs for the purpose of determining whether plaintiffs were engaged in transportation of property by motor vehicle as a common or contract carrier without requisite authority, in violation of Sections 206(a) or 209(a) of the Interstate Commerce Act, 49 U.S.C. 306(a) or 309(a). The matter was referred to an examiner and a hearing was held on March 29, 1957, in San Antonio, Texas.

On August 29, 1957, the report and recommended order of the Examiner was served upon the parties, wherein the Examiner found that the motor carrier operations conducted by plaintiffs were not in violation of the Interstate Commerce Act, and recommended that the proceedings be discontinued. Exceptions were filed by the Commission's Bureau of Inquiry and Compliance.

On August 3, 1959, Division 1 of the Interstate Commerce Commission found that while the statement of facts in the Examiner's report was adequate in all material respects, that said Examiner was in error as to his conclusions with respect to the nature of the transportation conducted by plaintiffs and the lawfulness thereof. It thereupon refused to adopt the Examiner's recommended order, but instead found that the plaintiffs were engaged in the unauthorized transportation of sugar in violation of the Interstate Commerce Act, and ordered plaintiffs to cease

and desist from continuing such unlawful carriage. The Commission denies plaintiffs' petition for a rehearing and on April 5, 1960, ordered plaintiffs to cease and desist said unlawful carriage on or before May 23, 1960, and plaintiffs thereupon instituted this suit.

The basis facts in this proceeding are relatively uncomplicated. Plaintiffs are in the business of buying and selling livestock, in the feed mill business, and also buy and sell corn, oats, wheat, bran, molasses, sugar, salt, fertilizers, and everything in the feed line. Plaintiffs have been in business since about 1934, gradually increasing the number of items bought and sold with sugar being added as a saleable item about the year 1954. The large percentage of plaintiffs' assets are not composed of transportation facilities, nor do the salaries of truck drivers used to drive the trucks that from time to time haul sugar compose as much as twenty-five percent of plaintiffs' average weekly payroll. Plaintiffs purchase sugar in Louisiana in their own name, and haul same to San Antonio, Texas, in their own trucks, are fully responsible for same in the event of its damage or loss in value because of price fluctuations prior to the sale thereof, and maintain a reasonable inventory of sugar at their place of business in San Antonio. Plaintiffs sell sugar on credit and have sizeable amounts of accounts receivable owed by sugar purchasers. There is no evidence in the record showing that there are any identifiable transportation charges made by plaintiffs to the purchasers of sugar, nor have plaintiffs any basis or formula for assessing transportation charges. There is no evidence in the record showing that plaintiffs hold themselves out to the general public to haul sugar for any compensation, nor that it is plaintiffs' general practice to obtain orders for sugar from its

customers prior to purchasing same in Louisiana. The record clearly indicates that plaintiffs are in a general mercantile business buying and selling many items, including sugar.

There is not substantial evidence in the record upon which to base the Interstate Commerce Commission's findings and conclusions, nor is there substantial evidence in the record to indicate that plaintiffs have been and are engaging in transportation, in interstate commerce, of sugar as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206(a) or 209(a) of the Interstate Commerce Commission arbitrarily exceeded its legal authority and defendants should be permanently enjoined from enforcing the terms of said order of April 5, 1960, which required and requires plaintiffs to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce found in the above described report of Division 1 of the Interstate Commerce Commission dated August 29, 1959, to be unlawful, until appropriate authority therefor is obtained. This Court will grant plaintiffs the relief they seek.

Opinion rendered this 24th day of April, 1963.

(S) JOHN R. BROWN,  
*United States Circuit Judge.*

(S) JOE M. INGRAHAM,  
*United States District Judge.*

(S) BEN H. RICE, Jr.,  
*United States District Judge.*

In the United States District Court for the Western  
District of Texas, San Antonio Division

Civil Action No. 2840

EMMA SHANNON AND RICHARD J. SHANNON d/b/a  
E. & R. SHANNON

vs.

UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION ET AL.

On the 22nd day of September, 1961, in the above entitled and numbered cause came the plaintiffs, defendants, and intervenors, and submitted all matters in controversy to a statutory Three-Judge Court, consisting of Honorable John R. Brown, Judge of the United States Court of Appeals for the Fifth Circuit; Honorable Joe M. Ingraham, Judge of the United States District Court for the Southern District of Texas; and Honorable Ben H. Rice, Jr., Judge of the United States District Court for the Western District of Texas, and the Court after having considered the evidence in this cause and the written and oral argument of counsel, finds that plaintiffs are in a general mercantile business buying and selling many items, including sugar, and that there is not substantial evidence in the record upon which to base the Interstate Commerce Commission's findings and conclusions that plaintiffs have been and are engaging in transportation in interstate commerce of sugar as a common or contract carrier by motor vehicle without appropriate authority in violation of Sections 206(a) or 209(a) of the Interstate Commerce Act and that said Interstate Commerce Commission in so finding and concluding arbitrarily exceeded its legal authority and that consequently the plaintiffs are entitled to the relief for which they pray, and it is, therefore,



ORDERED, ADJUDGED and DECREED by this Court that the Interstate Commerce Commission and the United States of America be and they are hereby permanently enjoined from enforcing the terms of the order of the Interstate Commerce Commission dated April 5, 1960, which required and requires plaintiffs, EMMA SHANNON and RICHARD J. SHANNON, d/b/a E. & R. SHANNON, to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain jointly and severally from all operations in interstate or foreign commerce, found by Division I of the Interstate Commerce Commission by report dated August 29, 1959, to be unlawful.


It is further ordered that copies of this order be delivered by the Clerk of this Court to all parties, and that none of the costs herein be taxed against plaintiffs.

Signed and ordered entered this the 1st day of May, 1963.

(s) JOHN R. BROWN,  
*United States Circuit Judge.*

(s) JOE M. INGRAHAM,  
*United States District Judge.*

(s) BEN H. RICE, Jr.,  
*United States District Judge.*



## APPENDIX II

### Interstate Commerce Commission

No. MC-C-1994<sup>1</sup>

#### FRAERING BROKERAGE COMPANY, INC., INVESTIGATION OF OPERATIONS

*Decided August 3, 1959*

1. Operations by respondent, in No. MC-C-1994, in the transportation of sugar from Matthews, La., to Harlingen, Tex., found to be those of a carrier for hire for which authority is required. Order entered requiring respondent to cease and desist from such unauthorized operations.

2. Operations by respondents Emma Shannon and Richard J. Shannon, in No. MC-C-2055, in the transportation of sugar from Supreme, La., to points in Texas found to be those of a carrier for hire for which authority is required. Order entered requiring respondents, jointly and severally, to cease and desist from such unauthorized operations.

3. Respondent J. T. Wilcox found not shown to have engaged in transportation as a broker of transportation in violation of section 211 of the act. Order entered discontinuing proceeding No. MC-C-2055 as to this respondent.

<sup>1</sup> This report also embraces No. MC-C-2055, Emma Shannon et al., Investigation of Operations.

## REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND  
WEBB

## BY DIVISION 1:

These proceedings were heard on separate records and were the subject of separate examiner reports and recommended orders. Since related issues are involved, they will be disposed of here in a single report.

Exceptions were filed by respondent in the title proceeding to the order recommended by the examiner, and the Bureau of Inquiry and Compliance of this Commission, hereinafter called the Bureau, replied. In the subtitled proceeding, the Bureau filed exceptions to the order recommended by the examiner, and respondents replied. Our conclusions differ somewhat from those recommended.

In No. MC-C-1994 by order entered June 21, 1956, division 1, instituted an investigation under section 204(c) of the Interstate Commerce Act, to determine whether Fraering Brokerage Company, Inc., hereinafter called Fraering, of New Orleans, La., has been or is engaging in the transportation of property, in interstate or foreign commerce, for compensation, as either a common or contract carrier by motor vehicle in violation of section 206(a)(1) or 209(a)(1) of the act. After hearing, the examiner found that Fraering's transportation of sugar from Matthews, La., to points in Florida, Mississippi, and Texas is that of a for-hire carrier by motor vehicle subject to part II of the act, and recommended that it be ordered to cease and desist from such operations.

On exceptions Fraering contends that the examiner erred (1) in finding that it was interested solely in the revenue earned by its trucks transporting sugar in

order to obtain a return movement of canned goods, (2) in finding that its principal consideration in transporting sugar sold is the revenue received from the transportation thereof, and (3) in finding that transportation of sugar by it did not appear to be in furtherance of its selling operations. It asserts that under the "primary-business" test, hereinafter described, its transportation of sugar should be found to be incidental to and part of its brokerage operations and therefore private carriage. In reply [the] Bureau contends (1) that such transportation is not incidental to or in furtherance of Fraering's nontransportation business, (2) that, conceding that Fraering has a bona fide business as a broker of sugar, the existence of such a business does not of itself preclude a finding that the transportation of the concerned sugar is for-hire transportation, and (3) that its principal consideration in transporting the sugar is compensation earned by such transportation.

In No. MC-C-2055, division 1 instituted an investigation, by order dated November 5, 1956, under section 204(c) of the act, for the purpose of determining (1) whether Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, of San Antonio, Tex., hereinafter called the Shannons, have been and are engaged in the transportation of property as a common or contract carrier by motor vehicle in violation of section 206(a)(1) or 209(a)(1) of the act, and (2) whether J. T. Wilcox has been and is engaged in transactions as a broker in violation of section 211 of the act.

After hearing, the examiner found that the Shannons are engaged in the business of buying and selling livestock, livestock feedstuffs, molasses, grain, salt, and sugar; that the transportation in their own

vehicles of the sugar to which they hold title is in the furtherance of their primary noncarrier commercial enterprise; that under the "primary business" doctrine such transportation constitutes private carriage; and that the investigation should be discontinued. No evidence was presented at the hearing tending to show any unauthorized brokerage operations by respondent J. T. Wilcox, and the proceeding as to this respondent will be discontinued.

On exceptions the Bureau maintains (1) that the examiner erred in finding that the Shannons' transportation of sugar is in furtherance of a primary commercial enterprise other than transportation and hence private carriage, (2) that they transport sugar, not as a private carrier, but with the purpose of profiting from the transportation in the same manner as any for-hire carrier does, (3) that the purchase and sale of sugar is merely a device to procure a payload for vehicles which would otherwise return empty, (4) that the small storage of sugar at San Antonio, the direct deliveries to ultimate users, and the small profit (less than prevailing transportation costs) netted by respondents are all indicia of for-hire carriage, (5) that the close proximity of the dates of purchase to the dates of delivery to such users strongly indicates purchases by respondents to fill orders previously secured despite contrary claims, and (6) that taken together the foregoing facts require a finding that the Shannons are engaged in the interstate transportation of sugar as either a common or contract carrier by motor vehicle without appropriate authority from this Commission. In reply the Shannons assert that their primary business is that of buying and selling livestock, grain feed, sugar, and other commodities; that their transportation of sugar is in furtherance of their noncarrier commercial activities and a necessary in-

cident thereto; and that the findings of the examiner should be adopted.

The recommendations of the examiners, the exceptions, and the replies thereto have been considered in the light of the evidence. We find the statements of facts in the examiners' reports to be adequate in all material respects, and, as modified here, we adopt them as our own. Certain facts will be repeated herein for clarity of discussion.

*No. MC-C-1994.*—Fraering, operating a warehouse at New Orleans, engages in wholesale selling of canned foods, dried fruits, nonfood items, and certain specialty items, hereinafter collectively called groceries. In addition to wholesaling its own groceries, it sells some other grocery items as a broker, and acts as a broker of refined sugar produced by the South Coast Corporation of New Orleans, hereinafter called South Coast. Fraering's transportation of its own groceries admittedly is conducted as part or as an incident of its primary business, the sale and brokerage of certain products and, as such, its operations relating to these commodities are those of a private carrier. Fraering transports only a relatively small portion of brokered groceries compared to its own commodities and, to a great extent, only as an accommodation to those with whom it deals. Since the charge per case for this transportation of brokered groceries does not vary with distance traveled, only some of this transportation is profitable. The transportation of brokered groceries does not appreciably affect Fraering's cost of operation. This described transportation of brokered goods other than sugar is private carriage in bona fide furtherance of Fraering's wholesale and brokerage business. The transportation by Fraering in its own vehicles of its own groceries and of the grocery items it brokers is not challenged. It is



Fraering's activities with respect to the transportation of sugar which concern us here.

Within a defined area of the South and Southwest, Fraering is the exclusive selling agent for sugar produced by South Coast at Matthews, La., some 40 or 50 miles from New Orleans. Of the 8 million pounds of sugar sold by Fraering for South Coast, between September 1955 and January 1956, all but 810,000 pounds moved by for-hire carriers from Matthews directly to the various consignees. The remaining 810,000 pounds were handled by Fraering in its own tractor-trailer units of which it has four. These four units of equipment also were utilized to move groceries. Fraering's representative indicates (1) that Fraering only transports a load of sugar when it can be moved in conjunction with a grocery movement in the opposite direction; (2) that it has more groceries moving toward New Orleans from points in the Rio Grande Valley of Texas than sugar shipments in the other direction, and only utilizes rail carriers for the sugar movements when it is impossible to correlate an inbound grocery shipment with an outbound sugar shipment; (3) that, generally, the charge made for sugar transportation would little more than cover the cost of operation, and in some instances the charge for the transportation plus brokerage fees does not entirely cover the cost of operation of the trucks while loaded with a particular sugar shipment; (4) that, even though there are other benefits in using private carriage rather than for-hire carriage, the principal incentive for Fraering's transportation of sugar is that the sugar constitutes return lading for trucks moving its groceries in the opposite direction; and (5) that the revenue received is adequate to assure overall profitable operations inasmuch as the cost of transportation on the commodities moving in

the opposite direction is sharply reduced by the sugar backhaul.

Fraering takes possession of the sugar at Matthews and assumes responsibility for it while it is in transit but does not take title to it. South Coast is paid by the consignee for the sugar f.o.b. Matthews, and any transportation charge for carriage performed by Fraering, whether collected directly by it or collected by South Coast, belongs to Fraering. In the sale of sugar as a broker, Fraering enters into contracts with buyers on contract forms of South Coast or sells sugar on spot quotations from the refinery. It receives a brokerage fee which is unrelated to whether the sugar moves by for-hire carriage or by private carriage.

One of the principal purchasers of sugar produced by South Coast is located at Harlingen, in the Rio Grande Valley of Texas. Most of the sugar sold by Fraering to this buyer is transported by Fraering from the refinery to Harlingen. Fraering regularly purchases substantial quantities of groceries from a source of supply at Donna, Tex., about 23 miles west of Harlingen, and sometimes moves such commodities to New Orleans in conjunction with sugar hauls to Harlingen. On the movement of sugar from Matthews to Harlingen, Fraering collects 53.59 cents per 100 pounds over and above the cost of the sugar at point of origin; this compares with transportation charges of 73 cents per 100 pounds by rail in carloads and \$1.10 per 100 pounds, in truckload quantities by use of regulated for-hire motor carriers. There is some indication of record that Fraering provides the over-the-road transportation from the refinery to other sugar customers including military installations at points other than Harlingen, but its method of operation with respect to such customers and the

relationship of such operations to its primary business is not sufficiently developed in this record to further merit our consideration.

No. MC-C-2055.—The facts pertaining to the business activities and transportation engaged in by the Shannons are as follows: E. and R. Shannon, with headquarters and a warehouse at San Antonio, have been engaged as a partnership in the business of buying and selling livestock since 1934, and in connection therewith have transported livestock as a bona fide private carrier. In or about 1951 their activities were expanded to include the purchase and resale of grain, fertilizer, molasses, and salt, and in 1954, of sugar. They operate seven trucks which are used in connection with some deliveries to customers of the commodities in which they deal. On shipments of livestock and some other commodities (not including sugar) they use common carriers to some extent but have never used for-hire carriage for the transportation of sugar. No one questions but that the primary business of the Shannons is that of a dealer in livestock and related items above named except sugar, and that the transportation by them of all of the named commodities, except sugar, is primarily in furtherance of their main or principal business. In dealings which correspond with movements of livestock transported to destinations in southern Louisiana, the Shannons have been purchasing sugar, in 100-pound bags, from a refinery at Supreme, La., and transporting and selling it to purchasers, the majority of whom are located in San Antonio. The distance from Supreme to San Antonio is 525 miles. All purchases from the refinery are made on credit, subject to a 2-percent discount if payment is made within 10 days, and the sales by the Shannons at San Antonio are made on the same terms.

An investigation by the Commission's district supervisor indicates that the sugar transported by the Shannons is customarily loaded at the refinery, moved directly to and unloaded at the place of business of the purchaser, although sometimes loads are delivered to the Shannons' warehouse at San Antonio and subsequently sold to users in small lots of from 1 to 25 bags. At the hearing the dominant partner maintained that the sugar transported is never sold until after it has left Supreme and is en route to San Antonio; but there are some contrary indications of record, and it is clear that whenever sugar transportation is not coordinated with an appropriate backhaul, it is transported to fill an order obtained in advance. On one occasion the Shannons were forced to use a public warehouse for a truckload of sugar because of space limitations of their own warehouse and, generally, the record supports a finding that sugar sales usually are made by the Shannons after it is en route or has arrived at their warehouse.

Based on the going market price, a bona fide dealer at San Antonio will normally realize a profit of from 25 to 35 cents per hundred pounds on sugar. The Bureau submitted an exhibit covering 15 truckloads of sugar transported by the Shannons from Supreme to San Antonio during the period from May to August 1956, on which the net profit to them, based upon the difference between the price paid at Supreme and that received at San Antonio, including transportation, ranged from 27 to 47 cents a hundred pounds, and averaged 35.74 cents per hundred pounds. The Bureau argues that the profits realized by the Shannons from their sugar sales and those realized by bona fide sugar dealers at San Antonio are not directly comparable because the former are computed without regard to transportation costs whereas the

latter necessarily allow for such costs. Compared to the Shannons' average profit of 35.74 cents per hundred including transportation, the record indicates that the applicable rail carload and motor truckload rates on sugar moving from and to the same point is 69 and 109 cents per hundred pounds, respectively. The 15 truckloads listed by the Bureau were resold in San Antonio within from 1 to 2 days after their pickup at Supreme. The Shannons' explanation of the rapid turnover is that sugar is highly perishable, being particularly susceptible to damage by dampness; that it is subject to sudden and drastic price fluctuations; and that consequently all dealers make a practice of selling it as quickly as possible in order to forestall any loss. They frankly admit, however, that the principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio and that in order to make a profit on the sugar haul they have to have traffic moving from San Antonio to Louisiana.

#### DISCUSSIONS AND CONCLUSIONS

In *Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. 65, 75, hereinafter called the *Lenoir case*, it was said that, if the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. This decision was affirmed by the Supreme Court of the United States in *Brooks Transp. Co., Inc., v. United States*, 340 U.S. 925.



Subsequent to the taking of evidence in the instant proceedings, section 203(c) of the act was amended (in August 1958) to read:

Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Amendment of this section had the effect, among other things, of writing into the act our usual or "primary business" test by which we determine whether questioned transportation activities of those also engaged in business enterprises other than transportation are within the scope of lawful private carriage or of motor-carrier operations for compensation for which authority from this Commission is required. From the portion of the legislative committee reports relating to the amendment of section 203(c) set forth in appendixes A and B hereto it is clear that insofar as the test expressed in the *Leñoir* case is concerned, the amended section is not intended to change, but to codify, the law with respect to the test for the determining of what transportation activities are permitted within the scope of lawful private carriage. It is our



view that the principal question here, whether considered prior to or subsequent to the amendment of section 203(c), inasmuch as neither Fraering nor the Shannons are engaged in transportation as a primary business, is whether the sugar transportation operations of Fraering or of the Shannons are in bona fide furtherance of the primary business of the respective respondents, on the one hand, or, on the other, are conducted as related or secondary enterprises with the purpose of profiting from the sugar transportation performed.

In each of the proceedings before us, the respondents are primarily engaged in certain noncarrier commercial enterprises. The respondents concededly are performing some transportation as private carriage within the scope, and in furtherance, of their respective primary business enterprises. In order to determine the status of their sugar transportation activities, we must consider both their primary business and the particular facts relating to each of the transportation operations performed.

Fraering is primarily a wholesaler and broker of certain grocery items but contends that its primary business includes the brokerage of sugar. Its transportation activities include the carriage of such commodities as canned foods, dried fruits, nonfood items, and certain specialty items. They also include the carriage of sugar. We are concerned here with how its sugar brokerage differs, if at all, from its wholesale and other brokerage business enterprise and how its sugar transportation activities differ, if at all, from its transportation activities which are concededly in furtherance of its primary business. The Shannons are engaged in buying and selling livestock and certain related items including, according to their contention, sugar. Similarly, we are concerned here

with how their sugar dealings differ, if at all, from their dealings in the other commodities and how their sugar transportation activities differ, if at all, from their transportation activities which are admittedly in furtherance of their primary business.

Fraering wholesales certain commodities for profit and, in fact, derives from its wholesaling enterprises most of its business profit. Its brokerage of certain grocery items does not change its basic wholesaling operation but, rather, adds to its line of few complementary items which are handled in a manner similar to those it sells as a wholesaler and does not change its profit sources or expectations. The handling of these items as a wholesaler or broker is its primary business from which it expects, without relying on profit which is expected to accrue from transportation activities, to make a profit. Its dealings in sugar, which it sells as a broker but does not transport and on which it merely profits as a broker, appears to be an enterprise similar to, or even a part of, its primary business. However, its dealings in some sugar, as in the situation where it buys at Matthews and sells at Harlingen, wherein the principal reason, clearly expressed in the record in the title proceeding, for such dealings is the generation of sugar shipments which it can transport as return lading for its trucks which are moving in the opposite direction, cannot be considered to be a part or within the scope of its primary business. That its activities with respect to this described sugar which it transports have a purpose different from the purposes of its primary business can be more clearly seen when it is considered that such sugar transportation is not believed by it to be undesirable or without profit even when the transportation charge plus brokerage fees do not entirely cover the cost of operation of the truck transporting the particular sugar shipment. It is

clear that the purpose of its engaging in the brokerage of such sugar and the transportation thereof from Matthews to Harlingen is to reduce the cost of transporting groceries (owned by it) from Donna to New Orleans. The "reduction of the cost of transportation" of the other commodities from Donna to New Orleans constitutes a profit from the transportation of sugar from Matthews to Harlingen, and we are satisfied that its operations with respect to the sugar which it transports from Matthews to Harlingen are undertaken "for the purpose of profiting from the transportation as such." In the *Lenoir* case we said that a finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that motor operations are conducted in bona fide furtherance of its other and primary enterprise. We have that situation here. Inasmuch as Fraering's transportation of sugar from Matthews to Harlingen makes its grocery transportation in the opposite direction more profitable, to this extent, it is an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which the grocery transportation is performed. It can, however, at most, be considered to be in furtherance of certain lawful private transportation operations of Fraering, and only secondarily related to the primary business of Fraering, which is again, a noncarrier, commercial enterprise. It is our opinion that, while its transportation of commodities other than sugar are in furtherance of its primary business, its transportation of the sugar, which it transports from Matthews to Harlingen, with respect to its primary business, is a related or secondary enterprise conducted with the purpose of profiting from the transportation performed and, as such, constitutes for-hire carriage for

which operating authority from this Commission is required; and we so find.

The Shannons have long been buying and selling certain commodities and in connection therewith transporting them to purchasers, in bona fide furtherance of their primary business, as a dealer in those commodities. The Bureau concedes that the transportation of livestock and certain related items is within the scope of lawful private carriage, but argues, in essence, that the here considered sugar transportation operation is undertaken to make profitable their lawful private-carrier activities in the opposite direction; is no more than a related or secondary enterprise, with respect to their primary business, inasmuch as it is conducted with the purposes of profiting from the transportation as such; and, as a consequence, is for-hire transportation subject to the licensing provisions of the act. There can be no question but that the considered sugar transportation and the transportation admittedly within the scope of their lawful private carrier activities tend to support one another and that part of the profit of each is the reduction of the cost of the other. It also seems clear that, in many instances, for example at the time of the hearing, dealership in the sugar by the Shannons would not be conducted at a profit without the benefit of backhaul traffic. In fact, the Shannons admit that their principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio, and that in order to make a profit on the backhaul of sugar they would have to have something moving to Louisiana from San Antonio. Although there are vague representations of record that the Shannons have transported sugar from Supreme to some points in Texas on occasions when the

shipments were not coordinated with backhauls of livestock or feeds, the dominant partner, in discussing such movements describes such a situation as one wherein they had an order, made a special trip to Supreme, and got "more" money for hauling the particular load of sugar handled under the arrangement. This situation in itself constitutes for-hire carriage within the doctrine of *Jay Cee Transport Co. Contract Carrier Application*, 68 M.C.C. 758, which holds, in part, that in a situation where a person actually does nothing but transport commodities from its suppliers to the users thereof, the fact that the person takes title to the goods is not sufficient to establish the person's status as a private carrier. The more usual arrangement under which they operate, however, appears to be one in which the Shannons have no pre-existing sugar order, but buy with the intention of selling later either en route or after the transportation is accomplished. This procedure is ordinarily coordinated with a backhaul, and the purpose of their sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks, which are moving in the opposite direction. We are satisfied that the purpose of their buying and selling sugar and the transportation thereof from Supreme to certain points in Texas is to reduce the cost of transporting other commodities outbound from San Antonio. Such reduction of the cost of transportation of the other commodities constitutes a profit from the transportation of sugar from Supreme to the Texas points, and we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such. Inasmuch as their transportation of sugar makes their transportation of other commodities in the opposite direction more profitable, to this extent, it is



an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which their transportation of other commodities is performed. But it can, at most, be considered to be in furtherance of certain lawful private transportation operations of the Shannons, and only secondarily related to their primary business, which, again, is a noncarrier commercial enterprise. Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required; and we so find.

We find in No. MC-C-1994 that Fraering Brokerage Company, Inc., has been and is engaging in transportation, in interstate commerce, of sugar from Matthews, La., to Harlingen, Tex., for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of section 206(a) or 209(a) of the Interstate Commerce Act; and that an order should be entered requiring it to cease and desist from all such for-hire operations until appropriate authority is obtained from this Commission.

We find in No. MC-C-2055 that Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, have been and are engaging in transportation, in interstate commerce, of sugar from Supreme, [La.], to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of section 206(a) or 209(a) of the Interstate Commerce Act; and that an order should be entered requiring them to cease and desist from all such for-hire operations until appropriate authority is obtained from this Commission.



And, we further find in No. MC-C-2055 that J. T. Wilcox has not been shown to have engaged in any transactions as a broker of transportation in violation of section 211 of the act and that the proceeding should be discontinued as to respondent J. T. Wilcox.

Orders will be entered (1) requiring Fraering Brokerage Company, Inc., and Emma Shannon and Richard J. Shannon, in the respective proceedings, to cease and desist forthwith, and hereafter to abstain, from participation in any operation, in interstate or foreign commerce, of the character found in this report to be unlawful, unless and until there is in force and effect, with respect to such carriage, appropriate authority therefor, and, (2) in the subtitle proceeding, discontinuing the proceeding as to respondent J. T. Wilcox.

COMMISSIONER WEBB, dissenting in part:

I am unable to concur in the finding in No. MC-C-1994 that the respondent, Fraering, is engaged in for-hire transportation of sugar. Fraering is a bona fide broker of sugar, and this report concedes that its sugar business appears to be a part of its primary business. In the circumstances, it is my opinion that the evidence warrants the conclusion that its transportation of sugar is in furtherance of its primary (nontransportation) business and is a true private carriage operation.

I agree with the findings in No. MC-C-2055. The evidence warrants the conclusion that respondents Shannons, unlike Fraering, are not bona fide dealers in sugar despite their maintenance of a rather small sugar inventory at their San Antonio storage facility. They are properly found to be unlawfully engaged in for-hire transportation.

## APPENDIX A

*Portion of Senate Report No. 1647 of the Committee on Interstate and Foreign Commerce on S. 3778 relating to amendment of section 203(c) of the act*

7. ECONOMIC REGULATION OF COMMERCIAL TRANSPORTATION

A matter of serious concern to the subcommittee is the growing practice of persons engaging in the commercial transportation of property by motor vehicle under circumstances that do not constitute bona fide private carriage, as that term is properly understood, but that nonetheless enable them to evade the economic regulation to which common and contract carriers by motor vehicles are subject even though the transportation services performed are not specifically exempt from such regulation. Most frequently, perhaps, evasion of the economic regulation to which it is intended that all for-hire carrier transportation of property other than that specifically exempted shall be subject is accomplished under the guise of private carriage.

The enormous growth of commercial private carriage of property by motor vehicle in recent years, resulting as it has in a continuing erosion of huge volumes of traffic that would otherwise be available for transportation by public carriers, is a serious problem for the railroads and other common carriers. To the extent that this growth has occurred in bona fide private carriage, i.e., the transportation of one's own materials, supplies, and products in one's own vehicles within the scope and in furtherance of one's primary business enterprise (other than transportation), there is no room for complaint; but there is just cause for complaint as to motor carriage which although performed under the guise of private transportation is actually public

transportation. Not only do the purveyors of the transportation service evade economic regulations; but in many instances payment of the Federal transportation excise taxes is also avoided, for the tax on amounts paid for the transportation of property is not levied on proprietary transportation.

Various subterfuges are employed to evade economic regulation and avoid imposition of the transportation excise taxes. The one most commonly used is the so-called by-and-sell method of operation involving the issuance of bills of sale, invoices, and other such instruments to make it appear that the commodities being transported are those of the vehicle owner when in fact the transaction is merely a device to provide transportation for hire without a certificate or permit and without payment of the transportation tax. Another is the backhaul method of operation increasingly engaged in by concerns that deliver in their own trucks articles which they manufacture or sell and then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or where they transport property they do not own, such transportation being performed only for the purpose of receiving compensation for the otherwise empty return of their trucks.

There are numerous variations but, whatever the precise nature of the subterfuge employed, carriage of this sort undermines the strength of the regulated for-hire carriers and in so doing it also injures the public which is largely dependent upon regulated for-hire carriage for its transportation requirements. Protection is needed from destructive competition of this kind.

The Interstate Commerce Commission has said that this is one of the problems of most serious concern to it in administration of the Interstate Commerce Act, that where so-called

private carriage is a subterfuge for engaging in public transportation it constitutes a growing menace to shippers and carriers alike, being injurious to sound public transportation, promoting discrimination between shippers, and threatening existing rate structures. It was to curb just such practices that part II of the Interstate Commerce Act was enacted.

In the first session of the present Congress (Public Law 85-163, approved August 22, 1957) the Interstate Commerce Act was amended to prohibit one (except as otherwise specifically provided) from engaging in any "for-hire transportation business by motor vehicle" in interstate or foreign commerce without a certificate or a permit authorizing such transportation. This prohibition is expected to prove helpful in correcting certain of the abuses described, but it appears that loopholes may still remain. What is needed, in the opinion of the subcommittee, is a further prohibition to the effect that no person in any commercial enterprise other than a duly authorized or specifically exempt for-hire transportation business shall transport property by motor vehicle in interstate or foreign commerce unless such transportation is solely within the scope and in furtherance of a primary business enterprise (other than transportation) of such person.

With the Interstate Commerce Act amended in this way commercial highway transportation of property in interstate or foreign commerce would, with certain specific exemptions, be required to fall into one or another of three classes: (a) duly certificated common carriage, (b) duly permitted contract carriage, or (c) transportation solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter. Other commercial highway transportation, except as specifically provided would be prohib-

ited. This, it is believed, would serve to correct most of the abuses that have arisen in the name of private carriage and yet would not in any way jeopardize or interfere with what might be called legitimate or bona fide private carriage. Indeed the "primary business test" contained in *Brooks Transportation Co. v. U.S.* (340 U.S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute.

## APPENDIX B

### *Portion of House Report No. 1922 of the Committee on Interstate and Foreign Commerce on R. 12832 relating to amendment of section 203(c) of the act*

#### PSEUDO-PRIVATE CARRIAGE

(Sec. 7, amending sec. 203(c) of the act)

The erosion of traffic of regulated carriers has also been caused to a considerable extent by the growth of "pseudo-private carriage" by truck. One of the subterfuges most commonly used in this type of carriage is the "buy-and-sell" arrangement, whereby fictitious bills of sale and invoices are used to make it appear that the commodities being transported by truck are those of the vehicle owner and operator and that the transportation involved is private carriage. The real business of persons engaged in this type of operation is, in fact, transportation, and the movement of goods performed by them is not in furtherance of any primary, or bona fide business enterprise other than transportation.

In addition, businesses which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and



transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, pre-arranged plans are set up in order that the real consignee may receive transportation at a reduced cost.

This pseudo-private carriage is a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act. It constitutes a growing menace to shipper and carrier alike, and is not in the public interest. It is injurious to sound public transportation. It promotes discrimination between shippers and threatens the existing rate structures of regulated carriers. It makes possible the avoidance of payment of the Federal transportation of property tax, for this tax is not levied on the transportation of property owned by the carrier.

The Interstate Commerce Commission has found it most difficult to cope effectively with this problem under the present provisions of the Interstate Commerce Act. The Commission has urged the Congress for several years to make legislative changes in the act to eliminate these practices, and it drafted a bill to accomplish this objective; which was introduced as H.R. 5825, 85th Congress. That bill proposed to amend the definition of "private carrier" in section 203(a)(17) of the act by adding a proviso thereto to the effect that any person who purchases, transports, and sells property for the purpose of fostering a highway transportation business is engaging in a public transportation service and shall be subject to economic regulation by the Commission.

During the committee's hearings on H.R.



5825, many witnesses expressed the fear that if the definition of a private carrier of property by motor vehicle was changed, it would open the door to reconsideration of the concept of the "primary business" test of private carriage as enunciated by the Commission in the Lenoir Chair case (51 M.C.C. 65 (1949)) and by the United States Supreme Court in the Brooks case (Brooks Transportation Co. v. United States, 340 U.S. 925 (1951)).

In the Brooks case, the Supreme Court recognized the so-called primary business test as the governing criterion in establishing bona fide private carriage. Under that doctrine, if transportation is performed in furtherance of the primary business of the operator, even though a charge may be made for such service, the transportation is treated as bona fide private carriage. If, however, a bona fide noncarrier business is not established, the transportation is treated as for-hire.

This doctrine has been helpful to the bona fide private carriers. They are fearful that any amendment of the definition of "private carrier of property by motor vehicle" may result in an unsettling of the "primary business" test and require them to embark upon another long series of litigation similar to that which culminated in the Brooks decision.

In the first session of the 85th Congress the Interstate Commerce Act was amended (by Public Law 85-163) by the addition of section 203(c) which prohibits a person, except as otherwise specifically provided in the act, from engaging in any for-hire transportation business by motor vehicle in interstate or foreign commerce without a certificate or permit to authorize such transportation. This prohibition is expected to prove helpful in correcting certain abuses, but it appears that the abuses resulting from pseudo-private carriage are not adequately dealt with by section 203(c).

Under these circumstances several witnesses recommended, and this committee favors, the further amendment to section 203(c) of the act contained in section 7 of the reported bill. This amendment provides that no person shall, in connection with any other business enterprise, transport property by motor vehicle in interstate or foreign commerce unless such transportation is incidental to, and in furtherance of, a primary business enterprise (other than transportation) of such person. There is no intention on the part of this committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in the Brooks case.

### ORDER

At a session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D.C., on the 3rd day of August, A.D. 1959.

No. MC-C-1994

FRAERING BROKERAGE COMPANY, INC., INVESTIGATION  
OF OPERATIONS

No. MC-C-2055

EMMA SHANNON AND OTHERS, INVESTIGATION OF  
OPERATIONS

These proceedings having been duly instituted, and full investigation of the matters and things involved having been made, and the said division having, on the date hereof, made and filed a report herein containing its findings of fact and conclusions thereon which report is hereby referred to and made a part hereof;

*It is ordered*, That the respondent in No. MC-C-1994, be, and it is hereby, notified and required to

cease and desist forthwith, and thereafter to refrain and abstain, from all operations in interstate or foreign commerce of the character found in said division report to be unlawful, unless and until appropriate authority therefor is obtained.

*It is further ordered,* That respondents Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, in No. MC-C-2055, be, and they are hereby, notified and required to cease and desist forthwith, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce of the character found in the said division report to be unlawful, unless and until appropriate authority therefor is obtained.

*It is further ordered,* That the statutory effective and compliance date of this order be, and it is hereby, fixed as September 18, 1959.

*And it is further ordered,* That proceeding No. MC-C-2055, as to J. T. Wilcox be, and it is hereby, discontinued.

By the Commission, division 1.

[SEAL]

HAROLD D. MCCOY,

Secretary:

## ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 5th day of April, A.D. 1960.

No. MC-C-1994

FRAERING BROKERAGE COMPANY, INC., INVESTIGATION  
OF OPERATIONS

(New Orleans, La.)

No. MC-C-2055

EMMA SHANNON AND OTHERS, INVESTIGATION OF  
OPERATIONS

(San Antonio, Tex.)

Upon consideration of the records in the above-entitled proceeding, and of:

(1) Petition of Fraering Brokerage Co., Inc., respondent in No. MC-C-1994, filed September 30, 1959, for reconsideration;

(2) Joint petition of Emma Shannon and Richard J. Shannon, respondents in No. MC-C-2055, filed September 8, 1959, for reconsideration;

(3) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed October 16, 1959, to the petition in (1) above;

(4) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed September 25, 1959, to the petition in (2) above;


and good cause appearing therefor:

*It is ordered*, That the said petitions be, and they are hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law;

*It is ordered, That the order of August 3, 1959, as indefinitely postponed with respect to statutory effective and compliance date, be and it is hereby, reinstated, and the statutory effective and compliance date is hereby fixed as May 23, 1960.*

By the Commission.

[SEAL]

HAROLD D. MCCOY,   
*Secretary.*

## APPENDIX III

Section 203(a)(14) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(14), provides:

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(15), provides:

The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 203(a)(17) of the Interstate Commerce Act 49 U.S.C. § 303(a)(17), provides:



The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Section 203(c) of the Interstate Commerce Act, 49 U.S.C. § 303(c) provides:

Sec. 203(c) \* \* \* no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Section 206(a) of the Interstate Commerce Act, 49 U.S.C. § 306(a) in part provides:

\* \* \* no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: \* \* \*

Section 209(a) of the Interstate Commerce Act, 49 U.S.C. § 309(a) provides in part:

\* \* \* no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission authorizing such person to engage in such business: \* \* \*

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No. 406 v 421

**In the**  
**Supreme Court of the United States**

OCTOBER TERM, 1963

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, ET AL., APPELLANTS

v.

EMMA SHANNON AND RICHARD J. SHANNON, D/B/A  
E. AND R. SHANNON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF TEXAS—SAN ANTONIO DIVISION

MOTION TO DISMISS APPEAL OR TO AFFIRM

WALTER C. WOLFF, JR.  
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Attorneys for Appellees

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1963

---

No. 406

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, ET AL., APPELLANTS

v.

EMMA SHANNON AND RICHARD J. SHANNON, D/B/A  
E. AND R. SHANNON

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF TEXAS—SAN ANTONIO DIVISION*

---

**MOTION TO DISMISS OR AFFIRM**

Appellees, hereinafter referred to as appellee, move the Court to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment sought to be reviewed on the appeal on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

Hereinafter appellee will refer to the United States of America and Interstate Commerce Commission as appellant and to the various interveners as appellant interveners.

Inasmuch as the opinion of the District Court as well as the judgment thereof, the opinion of the Interstate Commerce Commission, as well as the order thereon and on the petition for reconsideration, and various

statutes are appended to appellant's jurisdictional statement under appendices I, II, and III, respectively, (APPENDIX I, pages 1a to 6a; APPENDIX II, pages 7a to 34a; Appendix III, pages 35a to 37a, all of appellant's jurisdictional statement), appellee will refer to same as such and the first appendix printed in this motion will be numbered APPENDIX IV and commence with page 1b.

### STATEMENT OF THE CASE

Appellee submits that certain important factors concerning appellee's operation in the sugar business are omitted by appellant and appellant interveners in their statement of the material facts involved in this case and for that matter was omitted in the opinion of the Interstate Commerce Commission, the original of which is appended to appellant's Jurisdictional Statement (Appendix II). These pertinent facts are found in the statement of facts prepared from the oral testimony taken before the examiner in this matter and were, of course, considered by the District Court of three judges in making the judgment and opinion in favor of appellee.

Appellee, of course, believes that an understanding of the complete fact situation is necessary for a proper determination of whether or not the question involved in this case is substantial. All parties in the District Court were required to file briefs in an attempt to substantiate their position. In the original brief of appellee a statement of facts is contained referring specifically to the testimony transcribed by the court reporter in the hearing before the examiner. This statement of facts contained in appellee's brief is found in Appendix IV (pp. 1b-7b). Neither appellant nor appellant interveners in their briefs before the District Court made any contention that appellee had



misquoted any of the testimony in said statement of facts.

Said facts show that the original hearing in this matter were made and developed as a result of a routine investigation and that about two years prior to the original hearing in this matter appellee had received a communication from the Interstate Commerce Commission concerning his sugar business but no action was at that time taken against him. (App. IV, pp. 1b) Appellee is in the business of buying and selling livestock, in the feed mill business, and also sells corn, oats, wheat, bran, molasses, sugar, salt, fertilizers and everything in the feed line. Appellee has been in business since about 1934 and began handling grains, fertilizers, molasses and similar items about six years prior to the 1957 hearing before the examiner in this matter and sugar a little over three years prior to said hearing. (App. I, pp. 3a; App. IV, pp. 1b) Appellee had seven trucks valued at \$14,176.50 as of December 31, 1956, and of those, only three of them were used for long hauling which includes the hauling of sugar and many other items. That the total amount of fixed assets of the company, including mill equipment, office furniture, automobiles, etc. is \$59,350.26 as of December 31, 1956, and all of said asset accounts remained fairly constant during the year 1956 and up until the date of hearing. (App. I, pp. 3a; App. IV, pp. 1b-2b) That in addition to the fixed asset accounts there were \$56,459.91 in current assets of which \$30,000.00 was in accounts receivable, leaving \$26,000.00 other assets, including approximately \$4,700.00 in cash, so that the three trucks being used to haul sugar represented in the total of seven trucks, the seven trucks being valued at \$14,176.50, was a small percentage of the total assets

of the company; and further such trucks used for hauling sugar also hauled many other items. (App. I, pp. 3a; App. IV pp. 2b) The salaries paid truck drivers used on the large trucks averaged \$240.00 per week out of a total payroll of \$1100.00 per week and the three truck drivers on the three large trucks were not paid exclusively for hauling sugar but hauled many other items. (App. I, pp. 3a; App. IV 2b)

Appellee purchases sugar taking title in his own name and any losses on same after purchase is borne by appellee. (App. I, pp. 3a; App. IV pp. 2b-3b) It is not appellee's practice to take orders for sugar and then obtain same. (App. I, pp. 3a-4a; App. II, pp. 15a; App. IV pp. 3b) Appellee attempts to sell the sugar as rapidly as possible because the market for sugar breaks rapidly, the margin of profit is comparatively small, and the commodity deteriorates quickly. (App. IV, pp. 3b-4b) The margin of profit in the sugar business for a sugar dealer in San Antonio, Texas, on the date of the hearing in March, 1957, was 25¢ to 35¢ per hundred pounds. (App. IV, pp. 3b-4b) Appellee could and had sent an empty truck from San Antonio to the place of purchase of the sugar at Supreme, Louisiana, to transport sugar back to San Antonio at a profit. (App. IV, pp. 4b). Appellee stated that he could not make a profit on such transportation at the prices sugar was selling for in San Antonio at the time of the hearing since beet sugar from Colorado, California, and Canada was, at such time, keeping the sales price of sugar down in San Antonio. (App. IV, pp. 4b).

The cost of unloading sugar and storing it is comparatively high and eats into or causes to vanish any profit that those in the sugar business might make, and the price fluctuation in the sugar business are

also quite drastic, which necessitates the moving of the item quickly to avoid possible loss. That although this would be true in any mercantile business some items are more perishable than others. (App. IV, pp. 4b) On occasion appellee will send an empty truck to Louisiana to load sugar, but as a matter of common sense it would be more profitable for him to be delivering some commodity that he was selling to Louisiana at the same time. (App. IV, pp. 5b) However, a considerable amount of sugar remains in the warehouse of appellee in San Antonio (over 50,000 pounds at the last inventory taken prior to the hearing, less that portion thereof which may have been in transit but still properly included in the inventory. (App. I, pp. 3a; App. IV, pp. 5b) From this stored sugar frequent sales in less than carload lots are made. (App. IV, pp. 5b) Appellee has on occasion stored sugar in commercial warehouses when his warehouse facilities were inadequate, but such additional expense, of course, is avoided when appellee's warehouse facilities can handle the storage. (App. IV, pp. 5b)

There was no evidence to show that there were any identifiable transportation charges made by appellee to the purchasers of the sugar, nor has appellee any basis or formula for assessing transportation charges, nor does appellee hold himself out to the general public to haul sugar for any compensation. (App. I, pp. 3a; App. IV, pp. 6b)

That prior to appellee's buying and selling of sugar he purchased and still does purchase salt and grain in the same manner as he now purchases and sells sugar; however, the Interstate Commerce Commission never questioned the transportation of any of the items handled in the identical manner as sugar. (App. II, pp. 14a and 21a; App. IV, pp. 6b)

Appellee sells almost all of his sugar to purchasers on credit and have been selling on credit since the inception of his sugar business. On the date of the hearing appellee had more than \$10,000.00 tied up in accounts receivable from purchasers of sugar and at times during 1956 (the year immediately prior to the hearing) had as much as \$20,000.00 to \$30,000.00 tied up in accounts receivable from sugar purchasers. (App. I, pp. 3a; App. IV, pp. 6b) Of course, what is considered a large inventory varies depending on the business and a large inventory in the sugar business would be considerably less than would an inventory of more stable products, where the market does not fluctuate, nor the item deteriorate as rapidly. (App. IV, pp. 6b-7b)

#### THE QUESTION IS UNSUBSTANTIAL

After the evidence had all been introduced before the examiner in this matter said examiner found that appellee was engaged in the business of buying and selling livestock, livestock feed stuffs, molasses, grain, salt and sugar, and that the transportation in their own trucks of the sugar to which they hold title is in furtherance of their primary non-carrier commercial enterprise; and that under the "primary business" doctrine that such transportation constituted private carriage and recommended that the investigation be discontinued. (App. II, pp. 9a - 10a)

The investigation was ordered November 5, 1956, (App. II, pp. 9a), the hearing held in March, 1957, (App. IV, pp. 1b) and the Examiner's report and recommended findings were served on August 29, 1957. Approximately two years later, on August 3, 1959, the Interstate Commerce Commission made its order and opinion refusing to accept the recommended

order of the examiner. (App. II, pp. 7a). The Interstate Commerce Commission in said opinion found that the statement of facts in the examiner's report was adequate in all material respects and, as modified in said opinion, said Interstate Commerce Commission adopted said examiner's report as their own. (App. II, pp. 11a).

It was during the interim period between the time that the examiner's recommended report was filed in August of 1957, and the time that the opinion of the Interstate Commerce Commission was written in August of 1959, that the Transportation Act of 1958, 72 Stat. 574, Section 203 (c) was amended. (App. III, pp. 36a)

Appellee will discuss what, in his opinion, is the effect of such amendment in a later portion of this motion. Suffice it to say at this point that appellee believes that the Interstate Commerce Commission requested legislation from the Congress to attempt to bring a fact situation, such as the present case, into prohibited carriage; but, instead, all that the Congress did was to write the "primary business" test already existent in the case law into statutory law, so that, in effect, there was no actual change made in the effect of the law upon appellee because of the passage of such statute. It is further evident that the "primary business" test remained the same as it had been previously decided by the courts, so that, of course, this case does not involve a substantial question.

Appellee mentions the examiner's report at this stage, however, for another reason. Whenever there is an examiner involved, who has heard all the witnesses, and finds in favor of a governmental agency and later the substantial evidence rule comes into play,



regardless of the state of the record, there is always the specter lurking behind the whole case that the examiner did not believe the testimony of all of the individual witnesses and that, therefore, the individual had no evidence to substantiate his contentions. This would mean that through presumption, taken together with the substantial evidence rule, the governmental agency would have sustained its burden before the courts. In the case at bar, however, the above is completely inapplicable because the examiner ruled straight down the line in favor of appellee and said examiner, after having heard all of appellee's witnesses in person, was satisfied that the evidence given by said witnesses was true, and from the facts the case against appellee should be dismissed. In fact, the cases go further in upholding the validity of the examiner's report and do not limit the worth of same merely to prevent it from being said that all of the material evidence elicited from the individual witnesses was not believed. Instead the cases give the examiner's report some affirmative worth in a case such as the case at bar, and that it requires a more severe study of the record in order to uphold the governmental agency's order under the substantial evidence rule. In this connection please see *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474.

As to the amendment of Section 203 (c) of the Interstate Commerce Act, 49 U.S.C. Section 303 (c) (App. III, pp. 36a), as above stated, such amendment merely brought the "primary business" test into the statutes, even though same had been applied in the case law for a number of years. A leading case in this field is, of course, *Brooks Transportation Co., Inc. et. al. vs. United States, et. al.*, (U.S.D.C.E.D. Va., 1950), 93 F. Supp. 517, affirmed, 340 U. S. 925. In that case the



Court held that if it is established that the primary business of a concern is the manufacture or sale of goods which the concern transports itself in the furtherance of its primary business, and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or added as a separate item. Although the delivery of the items in the *Brooks* case were somewhat different from the case at bar, in that the company's trucks in the *Brooks* case delivered the items from the place of business to the customers; still the case is similar to the case at bar, since when the trucks returned to the factory, they brought back materials needed at the factory. It should be pointed out that in the *Brooks* case, there was a definite transportation charge made, which charge has never been made by appellee, and still the *Brooks* case held the carriage to be private.

In the application of the *Brooks* case to the case at bar appellant seems to ignore the fact that appellee is in a general mercantile business and that all of the items sold by appellee, with the exception of sugar, have been expressly approved by appellant as part of the business of appellee — this being so, even though prior to his being engaged in the sugar business, and thereafter, appellee has brought back other items in their trucks in their business in the Louisiana area in the identical manner as is now done in the sugar phase of their operation, which has been held to be permissible and legal. From scrutinizing the record in this case as a whole, and the operation of appellee as a whole, appellee is engaged in a general mercantile business dealing with various types of items, including sugar. Applying the "primary business" test in this

matter, it is obvious that the transportation of sugar from Supreme, Louisiana, to San Antonio, Texas, by appellee is certainly in furtherance of a "primary business" enterprise which is the general mercantile business of appellee. From the evidence it is also clear that a more restrictive interpretation of the "primary business" test would also require a holding that appellee is engaged in the sugar business. This is pointed out by the fact that appellee purchases sugar in his own name, has no pre-existing orders for same, has only a reasonably small percentage of his assets tied up in transportation facilities, and only part of its transportation facilities are used for the transportation of sugar. Further that appellee is selling the sugar at the going market price in San Antonio and obtaining the going market profit therefor, is maintaining a reasonable inventory of sugar on hand, is responsible for any loss or damage to the sugar, and is selling sugar on credit and has substantial accounts receivable tied up in sugar. The *Brooks* case discusses various reasons why a concern might want to deliver in its own trucks rather than use a common carrier, such as the absence of congestion at loading docks, the safe arrival of goods not mixed with those belonging to others, the control over the time of delivery, etc.

Appellee submits that the various factors found by the District Court in the case at bar are most important in considering the "primary business" doctrine. Certainly it cannot be said that the District Court ignored said doctrine in its decision in this case. That this is so can clearly be shown from the fact that this case was decided not long after the case cited by appellant in its jurisdictional statement, same being in *Church Point Wholesale Beverage Co. v. United States*, 200 F. Supp. 508 (W.D. La.). There the court, after

discussing the "primary business" test of Section 203 (c) as it concerned the fact situation in that case, found that under said test the plaintiffs in that case were engaged in prohibited transportation without a proper permit. It should be noted, however, that in that case most of the goods purchased were purchased with pre-existing orders, no inventories were kept, and that the marketing area was hundreds of miles beyond the plaintiffs selling of their other products. Of course, none of these factors are involved in the case at bar. Most important is the fact, however, that Judge John R. Brown from the United States Court of Appeals, Fifth Circuit was one of the three judges in both the *Church Point Wholesale Beverage Co.* case and the case at bar.

Evidently Judge Brown felt that there was a difference in the fact situations in the two cases as evidenced by the holdings of the courts in the respective cases. Certainly each case must be decided upon its own set of facts, and merely because appellee admits that he has gone into the sugar business to make a profit should not change his private carriage into something else. His admission is but a statement of common sense, and if he could not make a profit buying and selling sugar, it would be foolish for him to continue to do so; nor should the "primary business" test require that he lose money on a particular item in order for same to come under the doctrine.

All of the above is material upon the matter of whether or not the question involved in this case is substantial because this case was decided by the District Court based on a fact situation considerably different from those cases holding that there was no private carriage involved under the "primary business" test. As already pointed out the case is different

from the facts in the *Church Point Wholesale Beverage Co.* The case is also different from the case of *Interstate Commerce Commission v. Stickle*, (Ct. of Appeals, 10th Circuit, 1942) 128 F. 2d 155, which is the case that appellant first cited to appellee after their investigation of appellee was completed, as authority for appellant's decision to require a hearing.

Nor should any cases that were decided prior to the time that Section 203 (c) of the Act was amended (1958) be held to be immaterial to the case at bar, insofar as the question of being substantial is concerned, since it is now necessary for the first time to consider the meaning of said amendment. Actually, it is very clear that said amendment did nothing but make the statutory language of the Interstate Commerce Act conform to the language of the previously existing case law concerning this matter.

Appellee has always taken the position that the adoption of said amendment codified the existing law on the subject. Appellant arrives at the same conclusion in their opinion in the case at bar when they say in App. II, pp. 17a:

"Subsequent to the taking of evidence in the instant proceedings, section 203 (c) of the act was amended (in August 1958) to read:

Except as provided in section 202 (c) section 203 (b), in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such trans-

portation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.'

"Amendment of this section had the effect, among other things, of writing into the act our usual or 'primary business' test by which we determine whether questioned transportation activities of those also engaged in business enterprises other than transportation are within the scope of lawful private carriage or of motor-carrier operations for compensation for which authority from this Commission is required. From the portion of the legislative committee reports relating to the amendment of section 203(c) set forth in appendixes A and B hereto it is clear that insofar as the test expressed in the *Lenoir* case is concerned, the amended section is not intended to change, but to codify, the law with respect to the test for the determining of what transportation activities are permitted within the scope of lawful private carriage. It is our view that the principal question here, whether considered prior to or subsequent to the amendment of section 203(c), inasmuch as neither Fraering nor the Shannons are engaged in transportation as a primary business, is whether the sugar transportation operations of Fraering or of the Shannons are in bona fide furtherance of the primary business of the respective respondents, on the one hand, or, on the other, are conducted as related or secondary enterprises with the purpose of profiting from the sugar transportation performed."

The only quarrel that appellee might have with the above statement concerning the codification of the "primary business" test is that said amendment wrote into the statute the "primary business" test as applied



by the courts as opposed to the test as applied by the Interstate Commerce Commission. Be that as it may, it appears that even though appellant states that the amendment merely codified the existing law, that in their written opinion in the case at bar, they stretch said "primary business" test all out of proportion and implied that the amendment has changed the law and placed a more severe burden on an individual to show that transportation is private carriage. Reference is made to Appendix B of the opinion and order of the Interstate Commerce Commission in the case at bar, same being a portion of House Report No. 1922 of the Committee on Interstate and Foreign Commerce (App. II, pp. 29a) which says as follows:

"Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, pre-arranged plans are set up in order that the real consignee may receive transportation at a reduced cost."

It is obvious that the Committee by its recommended amendment of the Act was intending to prevent subterfuge in this field and the prevention of pre-arranged plans to stop the real consignee from receiving transportation at a reduced cost. It is further obvious that the Committee did not intend to recommend the passage of an amendment which would change a bona fide merchandising venture such as in the case at bar into something other than private carriage.

The portion of the Senate Report No. 1647 of the Committee on Interstate and Foreign Commerce found in Appendix A of the opinion and order of the Interstate Commerce Commission in the case at bar (App. II, pp. 28a) makes it clear that it was not the intent of such Committee in their recommendation to Congress



to change the "primary business" test set out in the *Brooks* case supra. There the Committee stated:

"Indeed the 'primary business test' contained in *Brooks Transportation Co. v. U. S.* (340 U. S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute."

It is also stated in the House Report, above referred to, that there was no intention on the part of the Committee in any way to jeopardize or interfere with bona fide private carriage as recognized in the *Brooks* case. There the Committee states:

"There is no intention on the part of this committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in the *Brooks* case."

(App. II, pp. 31a)

It is thus clear that the amendment of the Interstate Commerce Act contained in section 203(c) has not changed the previously existing law, nor is there a substantial question involved in the interpretation of said pre-existing law as it applies to the fact situation in the case at bar. As shown in the House Report above referred to (App. II, pp. 29a - 30a) it was suggested to said Committee that the definition of "private carrier" be changed, such suggestion having been made by the Interstate Commerce Commission. It was proposed that there should be a proviso added to the definition of "private carrier" that any person who purchases, transports and sells property for the purpose of fostering a highway transportation business is engaged in a public transportation service. The Committee refused to go along with the amended definition and stated that it had no intention of unsettling the "primary busi-

ness" test, which would then require another long series of litigation, which finally culminated in the *Brooks* decision.

It is obvious that the Committee's recommended amendment of the Act also intended to prevent subterfuge in this field and the prevention of pre-arranged plans to stop the real consignee from receiving transportation at a reduced cost. It is further obvious that neither the Congressional amendment, nor the Committee's report recommending its passage, intended to change a bona fide merchandising venture such as in the case at bar into something other than private carriage. In the case at bar, there is no evidence whatsoever to show any "pre-arranged plans", set up in order that the real consignee may receive transportation at a reduced cost. The Congress certainly made its intent clear when it refused to change the definition of "private carrier", but, instead, reiterated the fact that it wanted to codify the "primary business" test in the *Brooks* case when it passed the legislation it did.

Reference is further made to the Senate Report (App. II, pp. 27a) where the Committee says:

"What is needed, in the opinion of the subcommittee, is a further prohibition to the effect that no person in any commercial enterprise other than a duly authorized or specifically exempt for-hire transportation business shall transport property by motor vehicle in interstate or foreign commerce unless such transportation is solely within the scope and in furtherance of a primary business enterprise (other than transportation) of such person."

By reading the actual amendment it is obvious that the word "solely" was omitted so that the Congress did not follow the subcommittee's recommendation and

limit the "primary business" test by the use of the word "solely". This would certainly show that the Congress intended there to be some leeway in the determination of "primary business". It is also worth noting that in the amendment "a" primary business enterprise is used instead of "the" primary business enterprise, which again seems to imply that there should be more leeway given in the determination of what is a "primary business" enterprise and that an individual could have more than one "primary business" enterprise.

It is obvious from studying the record as a whole in this case that appellee makes the reasonable profit of a sugar merchant in the locality where appellee operates. Certainly appellee does not raise sugar, so the costs of hauling sugar is an important factor to determine his margin of profit, since appellee buys and sells sugar; but storage costs, bookkeeping costs, bad debts, inventory losses, loading costs, etc. are also important factors, and just because hauling is an element of cost does not, by any stretch of the imagination, mean that appellee is in the trucking business for hire.

Regardless of what one calls it, whether or not appellee is in the trucking business would invariably boil down to the question of — are his operations really a subterfuge? And there is absolutely no evidence in the record to show that any of appellee's sugar operations are anything but legitimate and bona fide. How else could appellee be in the business of buying and selling sugar when appellee does not raise it? Appellee buys the sugar from the manufacturer, hauls it to his own business, taking title in his own name, and bearing the loss connected therewith; sells the sugar on credit with the attendant possibility of bad debt losses and, in the interim period, stores the sugar. What more

could appellee do to be considered a legitimate sugar merchant? Is it necessary for him to haul by rail and pay such costs when he has his own trucks available for hauling and has had them available over the years for his complete operation, starting with livestock, and expanding over the years to feed stuffs, grain, corn, molasses, salt and sugar. Is it necessary for appellee to send an empty truck to Louisiana to bring back his sugar and to send his livestock to Louisiana and bring the truck back empty in order for him to be considered a bona fide sugar merchant?

Nor is the fact that the average profit of appellee at the time of the hearing on the sale of sugar was about 35¢ per hundred weight when the transportation charges by common carrier were higher than that figure at that time controlling on the question of whether or not appellee was a private carrier. There is no evidence in the record in the case at bar to show that appellee was under-selling anyone else in their sales of sugar in San Antonio, Texas. In fact the evidence shows that he was merely selling his sugar in San Antonio, Texas, at the going market price in said city. There is also no evidence in the record that appellee was paying anything other than the wholesale price at Supreme, Louisiana, for his purchase of sugar. It would thus appear that, based upon the market price in San Antonio, at the time of the hearing, no one could afford to use a common carrier to haul sugar to San Antonio and make a profit. Of course, to go into this question and the question of how the sugar business is controlled in the San Antonio, Texas, area would require much speculation and assumption and improperly go outside the record in this case. There is also no evidence in the record as to how other sugar merchants in the San Antonio area transport their sugar to San

Antonio, whether by their own trucks, or by using a common carrier, and appellee will not speculate as to that either. There is evidence in the record, however, as above pointed out, that at the time of the hearing, beet sugar from other localities was depressing the market in the San Antonio area and that could possibly explain the profit per hundred weight at the time of the hearing. The point is, however, that the mere fact that the profit for sugar was less at the time of the hearing than the freight rate would not, of itself, or taken together with all other evidence in the case, under the substantial evidence rule, be sufficient to uphold the decision of the Interstate Commerce Commission in this case. There are many factors going into the cost of a product, including costs of transportation, handling, loading, unloading, bookkeeping, administrative salaries, warehousing, etc. Appellee believes that from all the evidence, it is clear that appellee possesses all the incidents of a bona fide sugar merchant and that his transportation of sugar to his warehouse and office in San Antonio is in furtherance of his primary mercantile business.

Appellee does not quarrel with the fact that the Interstate Commerce Commission has done an excellent job in the transportation field. Sometimes, however, such an agency with the best of intentions, may attempt to regulate certain individuals in a manner that they believe is for the public good, but as a result some innocent person or concern is caught in the shuffle and a legitimate and bona fide business is consequently interfered with. Appellee submits that in such a situation it is for the courts to scrutinize the situation and protect the injured party, which is exactly what the District Court did in the case at bar.



In addition to the main argument contained above as to fact that this question is not substantial, there are also certain technical arguments available to appellee which reach the same conclusion. In the first place the definitions of "common carrier" and "contract carrier" of the Interstate Commerce Act are mutually exclusive. Section 203 (a) (14) and (15) of the Interstate Commerce Act, 49 U.S.C. Section 303 (a) (14) and (15). (App. III, pp. 35a). Section 206 (a) of the Interstate Commerce Act, 49 U.S.C. Section 306 (a) prohibits the common carrier from operating without a proper certificate and Section 209 (a) of the Interstate Commerce Act, 49 U.S.C. Section 309 (a), prohibits a contract carrier from operating without a proper permit. (App. III, pp. 36a and 37a). In its opinion and order in the case at bar the Interstate Commerce Commission merely concluded that there had been a violation of one or the other of these sections but failed to reach a conclusion as to which of said sections were violated. (App. II, pp. 23a)

This equivocal conclusion deprives the order of the definiteness guaranteed by the standards of due process prescribed for administrative orders by numerous decisions of the court and the standards prescribed in Section 8 (b) of the Administrative Procedure Act, 60 Stat. 242 (5 U.S.C. Section 1007) in the following words:

"All decisions . . . shall include a statement of (1) findings and conclusions, as well as the reason or basis therefor, upon all material issues of fact, law or discretion presented on the record; . . ."

The standards of definiteness which must be met by an administrative order were clearly announced in the case of *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426 (1941). Since



the violation of an order of the Interstate Commerce Commission is a crime under Section 222 (a) of the Interstate Commerce Act, it would appear that an equivocal finding such as made in the case at bar is insufficient. Under said equivocal conclusion appellee would have to defend himself against a conclusion that he has committed either one or the other of two mutually exclusive violations. If there were ever a contempt action brought under the cease and desist order as propounded by the Interstate Commerce Commission, the court would be required to perform the supposedly completed administrative function of deciding, for the first time, which, if either, of the two sections has been violated by appellee. Further appellee in order not to be in violation of said order, ought to be able to determine what changes should be made in the manner of conduct of his sugar business to avoid the necessity of applying for either a common carrier certificate or a contract carrier permit. If he is a contract carrier, appellee ought to be able to be one no longer by terminating the "continuing contracts with one person or a limited number of persons" that are essential to the conclusion that he is a contract carrier, and if appellee is a common carrier, he ought to be able to cease the holding of himself out to the public, which is essential to his being such common carrier. Also under the order, if appellee is to continue in his sugar business, he must either obtain a contract carrier permit or a common carrier certificate, but from the order cannot determine which.

Proceeding further, it appears that the inability or refusal of the Interstate Commerce Commission to decide which of Sections 206 (a) or 209 (a) appellee is supposed to have violated is symptomatic of its failure to make the essential basic findings of fact that are

necessary to support either a conclusion that appellee is a common carrier or that appellee is a contract carrier. Certainly it is necessary for the Interstate Commerce Commission to make a finding of basic or underlying facts to be stated in support of ultimate conclusions, rather than make a general conclusion such as in the case at bar. If appellee is a common carrier then there should be some basic finding to the effect that appellee holds himself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property of any class or classes thereof, for compensation. On the other hand, if appellee is a contract carrier then there should be some basic finding to the effect that appellee engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation . . . under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer. These are basic facts which should be found to exist before any person can be found to be a common carrier or a contract carrier, but these findings were not made by the Interstate Commerce Commission. Of course, these findings were not made because there was no evidence in the record upon which they could have been made.

One final technical matter involved in this case is that actually appellee has never been charged with a violation of Section 203 (c) of the Interstate Commerce Act, but, instead, has only been charged with the

violation of Section 206. (a) (1) or 209 (a) (1) of said Act. (App. II, pp. 9a)

### CONCLUSION

Inasmuch as the questions upon which the decision of this cause depends are unsubstantial appellee respectfully requests that the Court dismiss this appeal or affirm the judgment sought to be reversed.

EMMA SHANNON AND RICHARD J. SHANNON  
D/B/A E. AND R. SHANNON, *Appellee*

Of Counsel:

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OF WOLFF & WOLFF

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## APPENDIX IV

E. and R. Shannon are a partnership with the original E. Shannon (Edward Shannon) being dead, and Richard Shannon and Emma Shannon being partners in the business and d/b/a under the name of E. and R. Shannon, at the time of the hearing in this matter, with Emma Shannon (the mother of Richard Shannon and wife of Edward Shannon) having a 25% in the business at that time. (Statement of Facts — SF 73-74) The facts developed by Mr. Whitehead, the District Supervisor of the Interstate Commerce Commission at San Antonio were made and developed as a result of a routine investigation (SF-13). That about two years prior to the hearing Mr. Shannon received a communication from the Commission concerning the question of his sugar business and no action was taken against him at that time (SF-21). That Mr. Richard Shannon is in the business of buying and selling livestock, in the feed mill business, and also sells corn, oats, wheat, bran, molasses, sugar, fertilizers and everything in the feed line (SF-73), also salt (SF-16). That Shannon has been in business since about 1934 and began handling grains, fertilizers, molasses and similar items about 6 years prior to the 1957 hearing, and sugar a little over 3 years prior to the 1957 hearing (SF-73-74). That Mr. Shannon has 7 trucks valued at \$14,176.50 (SF-45) as of December 31st, 1956 (SF-42-43). That of these 7 trucks (SF-60) only 3 of them are used for long hauling, which includes the hauling of sugar (SF 59-60). Also the trucks are not used for sugar but for hauling many other items. That the total amount of fixed assets of the company, including mill equipment, office furniture, automobiles, etc. is \$59,350.26 as of December 31st, 1956 (SF 46-47; 42-43). That the asset accounts listed on the balance

sheet as of December 31st, 1956, remained fairly constant during the year 1956 and were constant up to the date of the hearing (SF 49). That in addition to the fixed asset accounts there were \$56,459.91 in current assets of which \$30,000.00 was in accounts receivable leaving \$26,000.00 in actual assets including approximately \$4,700.00 cash and the rest prepaid expenses, inventories, etc. (SF 48) so that the three trucks being used to haul sugar represented in a total of seven trucks, the seven trucks being valued at \$14,176.50, was a small percentage of the total assets of the company, and further that such trucks used for hauling sugar were not used for same exclusively but on the contrary were also used to haul many other items. That the salaries paid the truck drivers used on the large trucks average about \$240.00 per week (SF 50) out of the total payroll of \$1,100.00 per week (SF-50) and, of course, as above stated, the three truck drivers on the three large trucks were not paid exclusively for hauling sugar but hauled many other items. That Mr. Shannon purchases sugar from J. Aron & Co., sugar refinery, Supreme, Louisiana, and that the sugar is billed to Mr. Shannon. This is admitted by Mr. Whitehead (SF 21-22): Also when Mr. Shannon sells sugar, such purchaser purchases the sugar from Mr. Shannon. This is pointed out because Mr. Whitehead used the word "consignee" to designate the person to whom Mr. Shannon sold the sugar and in Exhibit No. 1 introduced into evidence and to which respondents Shannon and Wilcox objected to the word "consignee" being used. However, Mr. Whitehead admitted that he used this word in error and that the sugar was always billed to Mr. Shannon and that the person Mr. Shannon sold sugar to should have been designated as the purchaser (SF 22). That Mr. Shannon purchases



sugar from Aron because he got started with them (SF 75) and has gone to Louisiana to attempt to get a reduction in price and actually contacted another concern to get a lower price, but that that concern did not have the needed grades of sugar so that Mr. Shannon has continued dealing with Aron (SF 75). That when something happens to the sugar after it is purchased from J. Aron & Co., the loss on same is borne wholly by Shannon (SF 75-76; SF 70-71). That Shannon does not take orders for sugar and then obtain the sugar from Louisiana (SF 79) and, in fact, on a number of instances, he has had some sugar already en route coming back and thought he had the sugar sold and it turned out that the prospective purchaser refused the sugar which meant that it would have to be stored and another purchaser attempted to be found (SF 79). This did not mean that he had the order before he purchased the sugar from Aron & Co., as Mr. Shannon himself stated (SF 79) but instead points to the fact that Shannon legitimately buys sugar from Aron & Co. and, if he cannot sell it, has to stand whatever loss there may be on the declining market or in case the sugar is damaged (SF 79) and, of course, as was pointed out by the attorney for the Bureau of Inquiry and Compliance that even though the prospective purchaser's refusal to purchase did not cost Mr. Shannon anything extra (SF 80); still, as a matter of common sense — in a business where the market breaks rapidly and the commodity deteriorates quickly, the loss of a sale can mean a considerable loss, since the cash representing the sales price is negotiable but many bags of sugar are not (SF 80). That the margin of profit in the sugar business is comparatively small and a reasonable profit for a sugar dealer in San Antonio on the date of the hearing, that is, March 1957,



is 25 to 35¢ per 100 lbs (SF 69). That Shannon could and had sent an empty truck from San Antonio to Supreme, Louisiana to transport sugar back at a profit. (SF 79-81). Shannon stated that he could not make a profit on such a transaction at the price sugar was then (at the time of the hearing) selling for in San Antonio (SF 82); since beet sugar from Colorado, California, and Canada was, at such time, keeping down the sales price of sugar in San Antonio (SF 76). Without waiving any objection plaintiffs have made to the introduction of Exhibit No. 1, plaintiffs would state that their profit as shown on such Exhibit of an average of approximately 35¢ per 100 pounds is merely the normal profit of a sugar dealer wherein the figures contained on Exhibits Nos. 2 and 3 designating the freight rates are entirely dissimilar. Mr. Whitehead did not dispute the above stated margin of profit because he testified that he did not know what the margin of profit would be (SF 23). That sugar is a perishable commodity (SF 70) and has to be turned over rapidly to realize any profit at all, because it will deteriorate (SF 70) and has a very short profit (SF 70); that the cost of unloading sugar and storing it is comparatively high and eats into or completely causes to vanish any profit that those in the sugar business might make (SF 17). That the price fluctuations in the sugar business are also quite drastic (SF 23 to 25) which again necessitates moving the item fast to avoid a possible loss. That it is necessary to sell sugar as quickly as possible to avoid this loss which, of course, is true in any mercantile business and yet, some items are more perishable than others (SF 24). Naturally, Mr. Shannon tries to sell his sugar as quickly as possible because of the above reasons but, as above set out, he does not obtain orders for sugar and then purchase

same but maintains a reasonably steady flow of sugar on his returning trucks from Louisiana. Also, as above stated, he may get the sugar sold as a truck is returning from Louisiana and then find that it is not sold. On occasion he will even send an empty truck over to Louisiana to load sugar (SF 16), but as a matter of common sense, it would be more profitable for him to be delivering some commodity that he was selling to Louisiana at the same time.

Be that as it may, when the sugar is returned to San Antonio, some of it might be sold while the truck is returning inasmuch as Shannon knows something about what his customers generally would want. However, a considerable amount of sugar remains in the warehouse (517 bags or over 50,000 lbs. at the last inventory taken prior to the hearing, less that portion thereof which may have been in transit but still properly included in inventory). (SF 35, 36, 37; 81). From this stored sugar frequent sales in less than carload lots are made (SF 77-78). Shannon has on occasion even stored sugar in commercial warehouses when his warehousing facilities, because of the amount of sugar and other items on hand at that time, were inadequate. However, because of the small margin of profit such a situation proved unprofitable (SF 36-37; SF 29-30). Also as to the sale included in Exhibit No. 1, to which respondents objected, because, among other reasons, same represented merely isolated sales of the parties, Mr. Whitehead admitted that the purchase and sale of sugar by Mr. Shannon was not limited to the individuals or companies listed on Exhibit No. 1, but simply that those persons did represent the principal purchasers from Mr. Shannon, but not that all of the purchasers purchasing sugar during the period covered in the exhibit were listed (SF 20). Although this point

might have no direct relevance to the case it is pointed out, so that a complete picture of the worth of Exhibit No. 1 may be brought to the attention of the Court.

That there is no evidence in the record showing that there are any identifiable transportation charges made by the plaintiffs to the purchasers of the sugar, nor have the plaintiffs any basis or formula for assessing transportation charges, but instead their sales are governed solely by the market price of sugar in San Antonio. There is no evidence in the record showing that the plaintiffs hold themselves out to the general public to haul sugar for any compensation.

That prior to plaintiffs' buying and selling of sugar, they purchased (and still do) salt and grain in the same manner as they now purchase and sell sugar (SF 83, 84); however the Interstate Commerce Commission never questioned the transportation of any of the items handled in the identical manner as sugar (opinion of Interstate Commerce Commission 81 MCC 341, herewith attached as part of transcript).

That Mr. Shannon sold almost all of the sugar to purchasers on credit (SF 37-38). These sales had been made on credit since the inception of Mr. Shannon's sugar business, that is, approximately three years prior to the hearing (SF 41). That at the date of the hearing in March 1957, Mr. Shannon had more than \$10,000.00 tied up in accounts receivable from purchasers of sugar (SF 41). That at times during 1956 he has had as much as \$20,000.00 and \$30,000.00 tied up in accounts receivable from sugar purchasers (SF 42). That any sugar on a truck on the date of taking inventory was carried in the inventory showing clearly that the sugar belonged to plaintiffs and they considered it theirs (SF 54). Of course, what is con-

sidered a large inventory varies depending on the business and a large inventory in the sugar business would be a considerably less inventory than would an inventory of more stable products, where the market does not fluctuate nor the item deteriorate so rapidly.

Nowhere does Mr. Whitehead testify from his own knowledge but is merely quoting what Mr. Shannon and Mr. Wilcox said. The record as a whole should be inspected to determine what Shannon's true operations were and, as Mr. Whitehead said, Mr. Shannon very vehemently declares "that this is a legitimate business of his; that he is in the sugar business" (SF 16).

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1963

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No. 421

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UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, ET AL., *Appellants*

v.

EMMA SHANNON AND RICHARD J. SHANNON, d/b/a  
E. AND B. SHANNON, *Appellee*

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On Appeal From the United States District Court for the  
Western District of Texas—San Antonio Division

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**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE**

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The Common Carrier Conference—Irrregular Route requests leave to file the accompanying Brief Amicus Curiae in behalf of the position taken by the Interstate Commerce Commission in this case.

The Common Carrier Conference—Irrregular Route of the American Trucking Associations, Inc., is comprised of 508

common carriers holding certificates of public convenience and necessity issued by the Interstate Commerce Commission. These motor carriers serve the shipping public over irregular routes. Members of this conference operate from a few up to several hundred units and provide a valuable common carrier service to the great bulk of the shipping public in this nation.

Our common carrier system, of which this association comprises an important part, seeks to protect itself from the serious inroads which this case would make on present ability to serve the entire shipping public regardless of size or ability to pay. The rule of the lower court is contrary to policy consistently followed by the Commission in accordance with the legislative dictates of Congress and seriously undermines the foundations of every one of the over 500 common carriers of this conference.

**BRIEF FOR THE COMMON CARRIER CONFERENCE  
—IRREGULAR ROUTE OF THE AMERICAN  
TRUCKING ASSOCIATIONS, INC., AMICUS  
CURIAE**

**I.**

**SUBSTANTIALITY OF THE QUESTION**

If the rule of the lower court in this case were allowed to stand, years and years of effort on the part of Congress and the Interstate Commerce Commission to develop and preserve a strong common carrier system would be destroyed. Our common carrier system has enabled even the smallest entrepreneur to obtain transportation and avoid the insidious menace of a private transportation monopoly such as was seen in *Standard Oil Company of New Jersey v. United States*, 221 U.S. 1 (1911).

The District Court decision in this case represents no more than a superficial understanding of the crucial role which a common carrier system plays in the preservation of a healthy free enterprise system. Congress amended



Section 203(c) of the Interstate Commerce Act in August of 1958 in order to give complete legislative sanction to the policy which the Commission has consistently followed to prevent the siphoning off of traffic from regulated for-hire carriers by "businesses which use their own trucks to deliver their own merchandise, [and which] are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others." Congress specifically condemns the type of operations being conducted in this case, further saying,

"Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks . . . this pseudo-private carriage is a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act."

See House Report No. 1922, 85th Congress, 2d Sess., of the Committee on Interstate and Foreign Commerce on R. 12832 relating to amendment of Section 203(c) of the act. σ

Therefore Section 203(c) of the act was amended in August, 1958 to the effect that no carrier in absence of specific legislative exemption shall operate without a certificate or permit issued by the Interstate Commerce Commission authorizing motor vehicle transportation in interstate or foreign commerce. Specifically it said,

"Nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person."

## II.

## NATURE OF THE ERROR

The opinion of the United States District Court for the Western District of Texas, San Antonio Division, in this case referred to below as *Emma Shannon and Richard J. Shannon, d/b/a E. and B. Shannon v. United States of America and Interstate Commerce Commission*, Civil Action No. 2840 (1963) omits any mention of Section 203(c) of the Interstate Commerce Act. It commits complete and serious error. It contravenes Congressional intent that private carriage be restricted to "such transportation . . . within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person."

The manner in which the lower court relates the facts of this case indicates the true significance of its failure to include any reference to Section 203(c) of the act. The major facts which the District Court marshals behind its decision are (1) the small percentage of investment in transportation facilities, (2) purchase of the sugar, (3) responsibility for damage or loss, (4) sales made on credit, (5) no identifiable transportation charges, and (6) no holding out to the general public of for-hire motor carrier services.

Despite these indicia of private carriage, the Commission and Congress have looked through this false mask and ruled that the purchase and sale of sugar to fill otherwise empty backhaul movements is not in furtherance of the primary business purpose of the transporter. Congress in Section 203(c) has codified in very explicit terms prohibition against this siphoning of business from the common carrier system: Congress found it to be detrimental both to the common carriers themselves and ultimately to the shipping public.

It has made a distinct choice in favor of the common carrier system over the interest of private carriers in

obtaining compensation in their backhaul movements. These private carriers are able to pick and choose the business which they transport at their own will, but common carriers owe a duty to the public as prescribed by Congress to publish tariffs and in accordance with those tariffs provide service to shippers whether large or small, profitable or unprofitable.

The crucial fact in this case is the appellee's admission that their *principal reason for purchasing sugar in Louisiana is to provide a backhaul in connection with out-bound movements of live stock and other commodities from San Antonio.* (81 M.C.C. pp. 341, 343, 346) This is precisely the conduct which Congress condemns by amending Section 203(c) of the act, and thereby places within 206(a), prohibiting common carriers from operating without a proper certificate or 209(a), prohibiting contract carriers from operating without a proper permit. Thus Congress has clearly prescribed that motor carriers must choose one of the three separate categories, (1) private, (2) contract, and (3) common carrier, all of which are clearly defined within the bounds of due process. Appellee in this case is at no disadvantage in determining what steps it must take to comply with the law.

### III.

#### GROUND'S FOR REVERSAL

The purpose of the Transportation Act of 1958, which included the above quoted amendment to the Interstate Commerce Act, was to aid our common carrier system. See House Report No. 1922, 85th Cong., 2d Sess., p. 2. *Church Point Wholesale Beverage Company v. United States*, 200 F. Supp. 508 (W.D. La. 1961) furnishes a complete discussion of the historical background of the primary business test as codified in Section 203(c) of the act and ample logic and precedent for reversing the decision entered below in this case.

In *Morgan Packing Company, Inc.*—Investigation of Operations, 92 M.C.C. 48, 51 (May 1, 1963), the Interstate Commerce Commission issued a cease and desist order similar to the one in the instant case. The *Morgan* case indicates the devastating effect that the common carrier system would suffer if the rule of this case were to be allowed to stand. The Commission therein found,

“In its fiscal year ended June 30, 1960, Morgan bought approximately 25,692,730 pounds of sugar for resale and its gross sugar sales amounted to about \$2,500,000 or less than ten percent of total company sales. During that same period, slightly more than 5,000,000 pounds of sugar were purchased for company use in its packing plant and in excess of 300,000 pounds were retailed in its Austin supermarket.”

Therefore the Morgan Packing Company was providing no more than mere transportation in the guise of a “purchase-and-sale”, “loss-leader,” transaction involving more than 20,000,000 pounds of sugar in excess of its own marketing requirements. This cane sugar was purchased and transported by the Morgan Packing Company from approximately seven sugar refineries located along the East Coast from Boston, Mass. to Jacksonville, Fla.; and in the New Orleans area. This transportation was provided to the West and Midwest, where there are no cane sugar refineries.

This “primary business” test is by no means limited to the transport of sugar, but the vast effect of the erroneous rule in this case is illustrated by the Commission’s decision in the *Morgan Packing Company* case. It extends to the entire range of commodities transported by every motor common carrier.

**CONCLUSION**

The issue presented is so substantial and compelling as to require full consideration, reversal and remand, upholding the order of the Interstate Commerce Commission.

Respectfully submitted,

JAMES E. WILSON  
716 Perpetual Building  
Washington, D. C. 20004

September, 1963

MOTION FILED OCT 4 1963  
Nos. 406 & 421

LIBRARY  
SUPREME COURT, U. S.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1963

RED BALL MOTOR FREIGHT, INC., et al., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a  
E. and R. SHANNON

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, et al., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a  
E. and R. SHANNON

Appeal From the United States District Court for the  
Western District of Texas, San Antonio Division

MOTION OF  
TRANSPORTATION ASSOCIATION OF AMERICA FOR  
LEAVE TO FILE BRIEF AS AMICUS CURIAE AND  
BRIEF OF TRANSPORTATION ASSOCIATION OF  
AMERICA AS AMICUS CURIAE

ROBERT E. REDDING  
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No. 406

RED BALL MOTOR FREIGHT, INC., et al., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a  
E. and R. SHANNON

---

No. 421

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, et al., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a  
E. and R. SHANNON

---

Appeal From the United States District Court for the  
Western District of Texas, San Antonio Division

---

**MOTION OF TRANSPORTATION ASSOCIATION OF  
AMERICA FOR LEAVE TO FILE BRIEF AS  
AMICUS CURIAE**

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The Transportation Association of America (herein-  
after referred to as TAA) respectfully moves this  
Court for leave to file the accompanying brief in these  
cases as *amicus curiae*. The consent of the attorneys

for the appellants herein has been obtained, but the attorney for the appellees has refused to consent to the filing of a brief by TAA as *amicus curiae*.

TAA is an industry-wide organization whose coast-to-coast membership includes an across-the-board representation of users, investors, and all six types of public transport carriers—airlines, freight forwarders, highway carriers, oil pipelines, railroads, and water carriers. Nearly half of TAA's membership consists of users of transportation services, many of which engage in private carrier operations or utilize the services of for-hire carriers specifically exempted from economic regulation.

The basic objectives of TAA are described, as follows:

- (1) To develop a favorable climate that will assure the best possible transportation service at the lowest possible cost, yet provide a sufficiently attractive return to the carriers to permit financial stability;
- (2) To promote and nurture public understanding of the importance of sound transportation policies and public awareness of national transport problems; and
- (3) To resist steadfastly all trends which might lead to government ownership or operation of any form of transportation.

TAA asks leave to file the accompanying brief to urge this Court (1) to give careful, deliberate, and thoughtful consideration to the interpretation of the federal legislation here under review and (2) to reverse the judgment of the court below in both proceedings:

TAA's brief does not attempt to restate all contentions made by the appellants in the lower court or in their respective jurisdictional statements now before this Court. Rather, the brief expresses the concern of TAA as a national policy-making association about the *trend away from common carriage and the growth of unregulated carriage*, particularly that portion represented by unlawful for-hire transport under the guise of private carriage.

TAA's Board of Directors, including more than 100 prominent leaders in industry, agriculture, and education are identified in Appendix I of the accompanying brief. This Board of Directors—all members with a strong interest in sound national transportation policies—has for many years approved TAA policy positions in support of greater stability of the regulated segment of the transport industry essential to both large and small shippers and the general public.

In fact, TAA actively supported federal legislation enacted in 1957 and 1958 which was designed to restrict and reduce growing unlawful for-hire motor transportation, so detrimental to the economic strength of our publicly regulated carriers. Indeed, TAA proposed to the Congress an amendment to Section 203(c) of the Interstate Commerce Act (49 U.S.C., Section 303 (c)) which was enacted in substantial part in 1958 and which is now before this Court for the first time for interpretation.

TAA is the only nationwide transport organization with representation from all transport interests. It played an active role in the enactment of the legislation here in issue. It has maintained continuous research of current transport trends. It is believed, therefore,

that the accompanying brief contains helpful information about national policy and public interest aspects of importance to the issue in these cases, which information has not or will not be presented by the other parties.

Respectfully submitted,

ROBERT E. REDDING  
*Vice President and General  
Counsel*

1710 H Street, N. W.  
Washington 6, D. C.

October 4, 1963

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1963

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No. 406

RED BALL MOTOR FREIGHT, INC., et al., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a  
 E. and R. SHANNON

---

No. 421

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
 COMMISSION, et al., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a  
 E. and R. SHANNON

---

Appeal From the United States District Court for the  
 Western District of Texas, San Antonio Division

---

**BRIEF OF TRANSPORTATION ASSOCIATION OF  
 AMERICA AS AMICUS CURIAE**

---

By leave of this Court, the Transportation Association of America (hereinafter referred to as TAA) files this brief as *amicus curiae*.



## **I. INTEREST OF THE AMICUS CURIAE**

TAA is an industry-wide organization whose coast-to-coast membership includes an across-the-board representation of users, investors, and all six types of public transport carriers—airlines, freight forwarders, highway carriers, oil pipelines, railroads, and water carriers. Nearly half of TAA's membership consists of users of transportation services, many of which engage in private carrier operations or utilize the services of for-hire carriers specifically exempted from economic regulation.

The basic objectives of TAA are described as follows:

- (1) To develop a favorable climate that will assure the best possible transportation service at the lowest possible cost, yet provide a sufficiently attractive return to the carriers to permit financial stability;
- (2) To promote and nurture public understanding of the importance of sound transportation policies and public awareness of national transport problems; and
- (3) To resist steadfastly all trends which might lead to government ownership or operation of any form of transportation.

TAA's Board of Directors, including more than 100 prominent leaders in industry, agriculture, and education, are identified in Appendix I of this brief. This Board of Directors—all members with a strong interest in sound national transportation policies—has for many years approved TAA policy positions in support of greater stability of the regulated segment of the

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transport industry essential to both large and small shippers and the general public.

In fact, TAA actively supported federal legislation enacted in 1957 and 1958 which was designed to restrict and reduce growing unauthorized for-hire motor transportation so detrimental to the economic strength of our publicly regulated carriers. Indeed, TAA proposed to the Congress an amendment to Section 203 (c) of the Interstate Commerce Act (49 U.S.C., Section 303 (c)) which was enacted in substantial part in 1958 and which is now before this Court for the first time for interpretation.

When TAA, in 1958, urged the enactment of legislation which amended Section 203 (c) of the Interstate Commerce Act, and is now here under review, the purpose of TAA was explained by Dr. George P. Baker, then President of TAA (now Chairman of the Board of Directors), and Professor of Transportation (now Dean) of the Harvard Graduate School of Business Administration, as follows:

"The purpose of the Association is to do whatever it can to preserve a private enterprise transportation system in this country.

"It was felt that in an area such as transportation, which is a closely regulated area, this requires keeping the laws up to date with the changing times and the history seems to indicate that where you have these particular groups vitally interested—users and investors and different forms of carriers—in this problem, it is extremely difficult to get legislation to keep laws up to date unless you work out among these different interest groups some common position, because so often the groups who oppose are able to stop legislation and the

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groups who are for it have great difficulty in getting it.

"The purpose of this organization is to have a forum where these different interest groups can try to express their opinions, learn what the other views are, and then try to work out some common position. The mechanism we do this through is what we call our Cooperative Project. We have a panel or committee structure. We have a User Panel made up of leaders of users of transportation who act as individuals. We have an Investor Panel, and then we have panels for the six forms of transportation that you know, including freight forwarders.

"These controversial proposals we throw at these committees. They take their positions. If these positions differ, as they usually do, we then have joint meetings of representatives, and we simply try to work out some compromise which will still be a constructive one. After that, these reports go to the Board of Directors. The Board of Directors takes a position, and then we endeavor to coordinate the efforts of these interest groups in Washington during the period that they try to get that put into legislation.

"In addition, we have one other activity, which is general public education on transportation problems. We do this through meetings around the country and through a certain amount of literature.

"That is the purpose of the Association."

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<sup>1</sup> Hearings on Redefinition of Private Carrier of Property by Motor Vehicle (H. R. 5825) before a subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives, 85th Cong., 2d. Sess., April 29, 1958, p. 16.

## II. ARGUMENT

### A. A Compelling Need Existed in 1957 and 1958 for Federal Legislation to Help Curb Unlawful For-Hire Motor Transportation.

During the early 1950's regulated trucking companies and railroads and the Interstate Commerce Commission (hereinafter referred to as the ICC) became increasingly concerned about the infringement of the for-hire transportation field by carriers operating under the guise of private carriage. In its 70th Annual Report, published in November, 1956, the ICC urged legislative action to make it clear that all for-hire motor carrier transportation, whatever its form, other than that specifically exempted, be made subject to regulation. The justification for such legislation was described at pages 161-2 of said report, as follows:

"There is a large area of motor transportation which, although cloaked with the form of private transportation, is not, in our opinion, private carriage as defined by the courts in the Lenoir Chair case (*Brooks Transportation Co. v. United States*, 340 U.S. 925).

"The principal business of persons engaged in this type of activity is, in fact, transportation, and the movement or carriage of property by them is not in furtherance of any primary or bona fide business enterprise other than transportation. Because the act defines common carriage and contract carriage specifically, the courts tend to construe these definitions strictly. This has left an area in which persons are engaging in the business of moving goods but which is regarded not subject to regulation as common or contract carriage. This situation does not give to the public the protection which it should receive and creates unstable conditions in the transportation industry

because unauthorized for-hire transportation is fostered through various devices."

In 1957, the Congress added Section 203 (c) to the Interstate Commerce Act, to prohibit persons from engaging in any for-hire transportation business by motor vehicle without ICC authority (See Appendix II). TAA supported this legislation.

In 1958, the Congress again considered legislation in this area. The principal objective of both the ICC and TAA in 1958 was to prohibit the "buy-and-sell" device employed by some pseudo private carriers as an outright subterfuge to avoid regulation. By this action, a shipper or trucker purchases the goods he transports at origin and sells them at destination with a profit derived from the carriage performed, thereby purporting to be a private carrier because he claims ownership of the goods while in transit.

The ICC-sponsored bills in the Second Session of the 85th Congress (H.R. 5825 and S. 1677) dealt solely with buy-and-sell activities, whereas the TAA proposal was written in broader language to encompass those activities, as well as other similar subterfuges which might be employed to engage in unauthorized for-hire transportation. The TAA-sponsored proposal did not affect legitimate private carriers and was at all times consistent with the basic TAA ground rule that "There should be no legislative restriction against private carriers (the user performing transportation of his own goods for his own account) except for safety purposes."

The legislative history of the 1958 amendment to Section 203 (c) makes it clear that the Congressional committees favoring such legislation were also con-



cerned about the growing practice of engaging in for-hire transport, under the guise of private carriage, and thus evading economic regulations. This was being done by the use of various subterfuges, including the buy-and-sell method.<sup>2</sup>

It was emphasized by TAA and other interested parties that the 1958 amendment would not upset the "primary business test" then utilized by the courts to determine the legality of transport operations by private carriers, as established in *Brooks Transportation Co. v. United States*, *supra*. Opponents of such legislation contended that it was unnecessary to enact into law a principle laid down by the United States Supreme Court. Both TAA and the ICC nonetheless endorsed such legislation and the Congress concurred, the basis therefor being summed up in the testimony of the then chairman of the ICC, as follows:

"The enactment into law of a principle laid down by the Supreme Court is certainly not without precedent . . . The very fact that difficulties have arisen in applying the law to the various factual situations involving illegal for-hire carriage has the undesirable effect of encouraging violations. It seems clear, therefore, that specific legislation dealing with this problem, backed up by legislative history, would be a deterrent to violations and would provide us with statutory support in enforcement proceedings before the courts."

The intention of the Congress to take definitive legislative action in 1958 which would clearly subject buy-and-sell operations to ICC economic regulation was emphasized by the Conference Committee action pre-

<sup>2</sup> See H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 17-18; S. Rep. No. 1647, 85th Cong., 2d Sess., pp. 5, 23, 24.



ceding final approval of the pending bill. The rejection of weak language for the stronger language now in the law, in order to assure strict interpretation of subterfuge techniques, was described in the Conference report as follows:

"The House Amendment provided that no person should, in connection with any business enterprise other than transportation, transport property by motor vehicle in interstate or foreign commerce unless such transportation was *incidental to*, and in furtherance of, a primary business enterprise, other than transportation, of such person. The conference agreement provides that no person, engaged in any business enterprise other than transportation, shall transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is *within the scope* and in furtherance of a primary *business enterprise*, other than transportation, of such person."<sup>3</sup> (Emphasis added)

In sum, the 1957 and 1958 amendments of the Interstate Commerce Act were strongly urged by government and industry alike in order to strengthen the nation's transportation system.

**B. The Need for More Effective Sanctions Against Illegal For-Hire Motor Transportation Continues to Exist.**

Since the end of World War II, our country has witnessed an impressive growth in the transportation of goods by truck. For example, the volume of intercity truck traffic, public and private, was 102 billion ton-miles in 1947. By 1962, trucks were handling an estimated 332 billion ton-miles of intercity freight, a

<sup>3</sup> Conference Report on Transportation Act of 1958, 85th Cong., 2d Sess., p. 16.

gain of 225%—or more than 3 times the 69% growth in the nation's total output of goods and services during the same period, as measured by the Gross National Product in terms of constant dollars.

The following table reflects the relative growth in intercity freight traffic during the post World War II period by both trucking and rail carriers:

*Billions of Intercity Ton-Miles*

	<i>Rail</i>	<i>ICC Truck</i>	<i>Non-ICC Truck</i>
1947	665	38	64
1962	600	117	215
Change	-65	+79	+151

From the above, it will be noted that the unregulated truckers during this period have captured nearly twice as much of the added traffic as the ICC-regulated truckers, while rail traffic volume actually dropped by 10%.

What is disturbing about this increasing use of unregulated carriers is the fact that an unknown, but apparently sizeable, portion of this unregulated truck traffic is illegal. In other words, a significant share of this unregulated freight traffic is being handled by carriers who are engaging in interstate for-hire transportation without proper operating authority from the ICC. If such illegal for-hire trucking operations are allowed to continue, *they will threaten the existence of our regulated national transportation system and lead to attempts to nationalize this industry.*

Such illegal trucking operations have been estimated by the ICC as applying to over 11 billion ton-miles of

traffic a year, which TAA estimates represents \$800 million annually in freight revenues to the common carriers. An ICC staff report, entitled "Gray Area of Transportation Operations", estimates that more than 20% of the illegal for-hire transport practices consists of buy-and-sell operations which are prohibited by the 1958 amendment to the Interstate Commerce Act.

In an effort to cope with the growing problem, the ICC is making a determined effort to control the illegal operations of truckers, especially those involving buy-and-sell operations. The number of ICC proceedings and court cases is increasing. For example, during the twelve-month period ended April 30, 1963, a total of 1,045 enforcement cases against motor carriers was successfully concluded, including 895 court cases and 150 proceedings before the Commission. While this stepped up program is to be commended, it is limited by the inadequate ICC personnel and funds to carry out an effective enforcement program and by the delays inherent in our present system of jurisprudence. For example, the original investigation of the operations of appellees herein was ordered by the ICC on June 21, 1956, *more than seven years ago*.

A number of states are also making determined efforts to curb violations but on a somewhat limited basis. For example, Illinois investigators made 4,053 arrests in 1960, compared with 3,448 the year before and only 66 in 1956. Enforcement activities have been stepped up, however, by a special committee organized by the National Conference of State Transportation Specialists, a working group of the National Association of Railroad and Utility Commissioners.

Industry organizations have also been active in combating the bootleg trucking problem. TAA in 1961 took the lead in establishing the Committee Against Unlawful Transportation (commonly referred to as CAUT), with a widespread membership of transport interests, to perform an educational function and coordinate the efforts of other interested groups. The National Industrial Traffic League, representing shippers throughout the country, has urged its members to assist in every way to avoid the aiding or abetting of unlawful transportation. The American Trucking Associations, Inc., which represents common, contract, and private motor carriers, has also been concerned about illegal truck operations and is studying the question.

The private carrier associations are also gravely concerned about the problem and have prepared considerable material for use of their shipper members, alerting them to the adverse effects of illegal for-hire operations. They are particularly concerned about the potential impact on private carriers that might result from changes in our present laws dealing with the enforcement of motor carrier regulations.

This subject has also received the recent attention of the President of the United States. President Kennedy, in his Transportation Message to the Congress on April 5, 1962, described common carriage as "the core of our transport system" and noted that "the common carrier is declining in status and stature with the consequent growth of the private and exempt carrier."

Less than a month later, the Secretary of Commerce submitted proposed legislation to the Congress to in-

crease enforcement activities on the highways, stating that the purpose of such legislation is "to help eliminate unlawful ('gray area') trucking operations which abound because of diverse, ambiguous laws and practical limitations in enforcement." Such legislation is now actively under review by the Congress.

As recently as September 18, 1963, Senator Smathers delivered an extensive statement on the floor of the United States Senate on the subject of illegal activities in the operations of motor carriers. Senator Smathers referred to his introduction of corrective legislation in 1961, when he was serving as chairman of the Surface Transportation Subcommittee of the Senate Commerce Committee. Senator Smathers commented, as follows:

"Introduction of the measure followed extensive hearings in that year which demonstrated that unlawful trucking had put great pressure on all modes of regulated common carriage and seriously threatened to undermine the ability of these carriers to serve the public."

Senator Smathers' bill, S. 2560, became known as the "gray area bill" and passed the Senate without dissent in the summer of 1962 shortly before adjournment of the Second Session of the 87th Congress. Because of his continuing concern about the problem of unlawful transportation, Senator Smathers on September 18, 1963, introduced S. 2152, essentially similar to the former S. 2560, and urged "expeditious and favorable consideration."

It is submitted that the need for more effective sanctions against illegal for-hire motor transportation continues to exist.

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<sup>1</sup> *Congressional Record*, September 18, 1963, p. 16449.



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**C. The Lower Court's Judgment in the Instant Cases  
Should Be Reversed.**

The appellants hereto have argued the merits of the instant cases at length in their respective jurisdictional statements. Such argument will not be repeated herein. TAA regrets, however, that the court below gave no apparent recognition to the fundamental policy problems or Congressional intent embodied in Section 203 (c). The case was disposed of without a single mention of the statutory standard, the primary business test, so clearly applicable to the instant proceedings.

Appellees admit that the buy-and-sell sugar operation was engaged in to avoid an empty backhaul, and thereby to profit from such backhaul. Under similar circumstances, the District Court for the Western District of Louisiana, Lake Charles Division, held that such activity constituted for-hire rather than private carriage, asserting that "this economic benefit accruing to the noncarrier business enterprise of the plaintiffs is too remote to place such transportation within the regulatory exemption afforded private carriage by the Interstate Commerce Act."<sup>5</sup>

### **III. CONCLUSION**

TAA is deeply concerned about the trend away from common carriage and the growth of unlawful for-hire transport under the guise of private carriage. TAA fears that the present statutory language under review herein, Section 203 (c) of the Interstate Commerce Act, will lose its effectiveness in preventing pseudo private carriage if the lower court judgment in the

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<sup>5</sup> *Church Point Wholesale Beverage Co. v. United States*, 200 F. Supp. 508, 512 (1961).



subject proceedings is affirmed. This would neither be in the national interest nor in accord with the intent of Congress.

Accordingly, TAA respectfully urges this Court to take full cognizance and give due weight to the current alarming trends in the field of motor transportation. In our judgment, a substantial question is presented and the judgment below should be reversed.

Respectfully submitted,

ROBERT E. REDDING

*Vice President and General  
Counsel*

Transportation Associa-  
tion of America

1710 H Street, N. W.  
Washington 6, D. C.

October 4, 1963

## APPENDIX I

## TRANSPORTATION ASSOCIATION OF AMERICA

## BOARD OF DIRECTORS

George P. Baker, *Chairman*  
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Harvard Graduate School of  
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Railway Co.  
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Jack Cole Company  
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Fe Railway System  
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Vice Chairman of the Board  
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Bank and Trust Company  
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Chicago, Illinois

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The Pennsylvania Railroad Co.  
Philadelphia, Pennsylvania

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Missouri Pacific Railroad Co.  
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Railroads  
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Washington, D. C.

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**APPENDIX II**

Section 203 (c) of the Interstate Commerce Act, 49 U.S.C. Section 303 (c), provides, as follows:

Sec. 203(c) \* \* \* no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1963

No. 406

RED BALL MOTOR-FREIGHT, INC., ET AL., *Appellants*,

v.

EMMA SHANNON AND RICHARD J. SHANNON, d/b/a  
E. AND R. SHANNON, *Appellees*.

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IN THE  
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RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants,*

v.

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E. AND R. SHANNON, *Appellees.*

**BRIEF IN OPPOSITION TO MOTION TO DISMISS  
APPEAL OR TO AFFIRM**

Appellants, Red Ball Motor Freight, Inc., and the other appellants named in appendix A hereto oppose the motion to dismiss the appeal or to affirm, without further hearing, the judgment of the lower court.

1. The motion itself demonstrates the need for the construction by this Court of the provisions of section 203(c) of the Interstate Commerce Act, 49 U.S.C. § 303(c). As alleged by the appellee (Motion, p. 8 *et seq.*), the 1958 amendment, 72 Stat. 574, did incorporate the "primary business test" of *Brooks Transportation Co. v. United States*, 93 F. Supp. 517, 522 (E.D. Va. 1950), *aff'd mem.*, 340 U.S. 925 (1951), for determining whether considered trucking operations came within the partial exemption from regulation accorded a private carrier of property by motor vehicle by section 204(a)(3) of the Act, 49 U.S.C. § 304(a)(3). However, it did much more.

The legislation was intended to,<sup>1</sup> and did, close a loophole in the regulatory scheme. No longer was it to be necessary in finding an operation unlawful, to establish that the transporter "held himself out to the public as a [common] carrier", *Interstate Commerce Com'n v. Woodall Food Products*, 112 F. Supp. 639, 641 (N.D. Ga. 1953), aff'd, 207 F. 2d 517 (5th Cir. 1953), or that, as a contract carrier, it had an "express contract for such a carriage for hire", *Taylor v. Interstate Commerce Commission*, 209 F. 2d 353, 355 (9th Cir. 1953), cert. denied, 347 U.S. 952 (1954).<sup>2</sup> Though the activities may not be such as to bring the transporter within the statutory definitions of common or contract carriage, 49 U.S.C. §§ 303(a)(14) & 303(a)(15), they nevertheless are prohibited "unless such

<sup>1</sup> The 70th Annual Report of the Interstate Commerce Commission 161-62 (1957), stated the problem, as follows:

"There is a large area of motor transportation which, although cloaked with the form of private transportation, is not, in our opinion, private carriage as defined by the courts in the Lenoir Chair case (*Brooks Transportation Co. v. United States*, 340 U.S. 925).

"The principal business of persons engaged in this type of activity is, in fact, transportation, and the movement or carriage of property performed by them is not in furtherance of any primary or bona fide business enterprise other than transportation. Because the act defines common carriage and contract carriage specifically, the courts tend to construe these definitions strictly. This has left an area in which persons are engaging in the business of moving goods but which is regarded not subject to regulation as common or contract carriage. This situation does not give to the public the protection which it should receive and creates unstable conditions in the transportation industry because unauthorized for-hire transportation is fostered through various devices. We therefore recommend that Congress amend the act as appropriate."

<sup>2</sup> The *Taylor* case was discussed in the 68th Annual Report of the Interstate Commerce Commission 82 (1954).

transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person." See S. Rep. No. 1647, 85th Cong., 2d Sess. 5, 23-25 (1958); H. R. Rep. No. 1922, 85th Cong., 2d Sess. 17-19 (1958); 104 Cong. Rec. 10818; 104 Cong. Rec. 12535.

The change in the law<sup>3</sup> obviates the need for such a finding as the appellees contend the Commission was required to enter (Motion, pp. 20-22), for, once the Commission concludes, as it did (81 M.C.C. 337 at 347, J.S. of U.S. and I.C.C., p. 23a) that the transportation is not within the scope, or in furtherance, of a primary, non transportation business, it matters not whether the unauthorized and, hence, proscribed, transportation is that of a common carrier by motor vehicle or that of a contract carrier by motor vehicle. Cf. *Vince v. Interstate Commerce Commission*, 267 F. 2d 577 (9th Cir. 1959); *Lamb v. Interstate Commerce Commission*, 259 F. 2d 358 (10th Cir. 1958); *Georgia Truck System v. Interstate Commerce Commission*, 123 F. 2d 210, 212 (5th Cir. 1941).

2. The conflict of lower court decisions cannot be explained away, as appellees attempt (Motion, pp. 10-12), by the crucial facts. Appellees do not so much

<sup>3</sup> The change in the law occurred between the time that the examiner submitted his report and recommended order on August 29, 1957, and the time the Commission, Division 1, served its report on August 11, 1959. Not only was it appropriate under the circumstances for the Commission to reach its own conclusions upon the examiner's recital of the facts, *Federal Communications Commission v. Allentown Broadcasting Co.*, 349 U.S. 358, 364 (1955); *W. J. Dillner Transfer Co. v. Interstate Commerce Commission*, 193 F. Supp. 823, 827-28 (W.D. Pa. 1961), aff'd mem., 368 U.S. 6 (1961); it was obliged to consider the matter under the provisions of the Act as amended. *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943).



as mention the decision of the United States District Court for the Southern District of Alabama in *Cahaba Steel Co. v. United States*, Civil Action No. 2669, decided January 17, 1962, in which the facts as found by the Commission in *Cahaba Steel Co.—Investigation of Operations*, 86 M.C.C. 759, 760-62 (1961), were virtually foursquare with those in the instant case.

Neither in the Cahaba case nor in *Church Point Wholesale Beverage Co. v. United States*, 200 F. Supp. 508 (W.D. La. 1961), was there any greater attempt made to conceal the dealings in the transported commodities than here. In each instance the transactions were conducted openly; however, this did not make them in their consequences, any the less a subterfuge to escape economic regulation of the for-hire motor transportation rendered.

The appellees ask the rhetorical question: What more might they have done to be considered legitimate sugar merchants? Motion, pp. 17-18. The obvious answer is that they might have attempted to promote their sugar business beyond the intermittent needs for loads of freight for their returning vehicles, but there was no evidence that they had done so. They might have employed commission salesmen or brokers to develop or expand their territory, but there was no evidence that they had done so. They might have made large-scale purchases of sugar, dealt in futures or engaged in hedging operations, but there was no evidence that they had done so. They might have dealt in beet sugar from Colorado or California, to which they didn't operate their trucks, but there was no evidence that they had done so. Indeed, they might have handled sugar in all respects as they did their other business.

On the contrary, the appellees make no attempt to deny that ordinarily they deal in sugar only by making

spot purchases of sugar at the Supreme refinery when an empty vehicle returning to San Antonio happens to be in the vicinity. They make no attempt to deny that the purpose of their transportation of the sugar is to profit from the transportation as such, not to further a nontransportation enterprise. It is this factor apparently ignored by the court below in evident disregard of its pertinency, that commands further consideration by this Court in the light of the change in the law wrought by the 1958 amendment.

### CONCLUSION

We submit, therefore, that the appellees' Motion clearly demonstrates that the decision below poses substantial questions warranting plenary consideration by this Court, and that the Motion should be denied.

Respectfully submitted,

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October 10, 1963

*Attorneys for Appellants*

**APPENDIX A**

The following intervening defendants do hereby participate in this Brief in Opposition to Motion to Dismiss Appeal or to Affirm:

- (1) Red Ball Motor Freight, Inc.
- (2) Brown Express, Inc.
- (3) Texas-Arizona Motor Freight, Inc.
- (4) Central Freight Lines, Inc.
- (5) The Atchison, Topeka and Santa Fe Railway Company
- (6) Chicago and North Western Railway Company
- (7) Chicago, Burlington & Quincy Railway Company
- (8) Chicago Great Western Railway Company
- (9) Chicago, Milwaukee, St. Paul and Pacific Railroad Company
- (10) Chicago, Rock Island and Pacific Railroad Company
- (11) Great Northern Railway Company
- (12) Illinois Central Railroad Company
- (13) The Kansas City Southern Railway Company
- (14) St. Louis-San Francisco Railway Company
- (15) Soo Line Railroad Company
- (16) Union Pacific Railroad Company
- (17) Wabash Railroad Company
- (18) The Western Pacific Railroad Company
- (19) Texas Tank Truck Carriers Association, Inc.
- (20) Regular Common Carrier Conference of American Trucking Associations, Inc.

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IN THE  
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OCTOBER TERM, 1963

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, *Appellants*,

v.

EMMA SHANNON AND RICHARD J. SHANNON  
d/b/a E. & R. SHANNON, *Appellees*.

BRIEF OF PRIVATE CARRIER CONFERENCE, INC.  
AMICUS CURIAE

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al. v. Emma Shannon and Richard J. Shannon, d/b/a E. & R.  
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UNITED STATES OF AMERICA AND INTERSTATE  
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d/b/a E. & R. SHANNON, *Appellees*.

---

BRIEF OF PRIVATE CARRIER CONFERENCE, INC.,  
AMICUS CURIAE

---

OPINIONS BELOW

The opinion of the district court (R. 163) is reported at 219 F: Supp. 781. The report of the Interstate Commerce Commission (R. 17) is printed at 81 M.C.C. 337.

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\* Consolidated with No. 406, Red Ball Motor Freight, Inc., et al. v. Emma Shannon and Richard J. Shannon, d/b/a E. & R. Shannon.

## JURISDICTION

The jurisdiction of this Court to review the judgment of the district court on direct appeal rests on 28 U.S.C. 1253 and 2101(b). The judgment of the three judge district court was entered on May 1, 1963 (R. 168). The appellants filed their notice of appeal in the district court on July 1, 1963 (R. 175). On November 12, 1963 this Court noted probable jurisdiction: 375 U.S. 901.

## STATUTES INVOLVED

Involved are Sections 203(a)(14), 203(a)(15), 203(a)(17), 203(c), 206(a), 209(a) of the Interstate Commerce Act, 49 U.S.C. 303(a)(14), 303(a)(15), 303(a)(17), 303(c), 306(a), 309(a), respectively, printed as Appendix III to the Jurisdictional Statement of the Appellants (pp. 35a-37a).

## QUESTION PRESENTED

Whether the district court applied the wrong standard for determining, under Section 203(c) of the Interstate Commerce Act, whether motor transportation is "within the scope, and in furtherance of, a primary business enterprise (other than transportation)" of a carrier and thus is private rather than for-hire transportation.

## STATEMENT

The Commission instituted on its own motion an investigation of appellees' operations. After hearing, the Commission found that appellees were engaging without authority as interstate motor contract carriers of sugar and ordered them to cease and desist. The district court set aside the order and from that judgment an appeal has been taken by the United States and the Commission to this Court.

### 1. The Operations of the Appellees

The appellees, a partnership, are engaged in the business of buying and selling livestock and other goods. Their principal business headquarters which includes a warehouse is located in San Antonio, Texas. (R. 67, 106, 113). The business includes dealing in fertilizer, feed-grains, molasses, and salt and since 1954 in sugar. (R. 66-67). These goods are picked up and delivered by appellees by common carriage and with their own trucks (R. 97, 115-116). Except for the transportation of sugar, appellees' transportation in their own vehicles of these items is not contended to be anything other than private carriage. (R. 67, 75).

The appellees' dealings in sugar were begun in 1954. They purchase sugar after delivering in their own vehicles shipments of livestock and other merchandise to customers at or near the site of a sugar refinery in Supreme, Louisiana. (R. 66-67, 107-108, 112). In the normal case, the appellees sell the sugar in truckload lots while it is in transit or within a day or two of the date on which it is picked up by their vehicles at Supreme, Louisiana (R. 75-76, 117-118). Ordinarily, deliveries are made directly from the refinery to the ultimate customers of the appellees who are usually located in the San Antonio area (R. 68, 83-84). Approximately one-half a truckload of sugar inventory is maintained in the warehouse of the appellees for sale in small lots (R. 68, 76-77, 80-81).

The warehouse is used primarily for storing and milling of feed stuffs (R. 74-75, 87-88). Appellees made a gross average profit of about 25¢ per hundred pounds on each truckload of sugar handled by them (R. 117-118). The respective rail and truck rates

for transportation of sugar between the same points are 69¢ per hundred pounds on rail carload shipments and \$1.09 per hundred pounds on truckload shipments (R. 77, 119-126).

## **2. The Decision of the Interstate Commerce Commission**

The Commission held that the appellees' transportation of sugar constituted for-hire rather than private carriage and ordered them to cease and desist therefrom unless and until they obtained appropriate operating authority. Unlike their transportation of livestock, feeds, and fertilizers, the Commission took the position that the transportation of sugar was not within the scope and in the furtherance of a non-transportation business and hence was not private carriage, 81 M.C.C. 347 (R. 30). The Commission said that under Section 203(c) of the Interstate Commerce Act, the basic touchstone for determining whether transportation conducted by someone whose primary business is not transportation is "whether the operations are in bona fide furtherance of a primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed", 81 M.C.C. 343 (R. 25).

## **3. The Decision of the District Court**

The district court set aside the order on the ground that the Commission finding that the appellees had engaged in for-hire carriage was not supported by substantial evidence, 249 F. Supp. 782-83 (R. 167). Describing the evidence, the court stated that the sugar was only one of a number of commodities which the appellees bought and sold and that the appellees were



engaged in the business of buying and selling goods. The district court went on to state that the appellees normally purchased sugar without having received orders for it; that a relatively small portion of the appellees' assets and payroll were devoted to transportation activities; that the appellees took title to the sugar and assumed the risks of loss or damage in transit or of price fluctuations; that the appellees sold the sugar on credit and sizable accounts receivable were outstanding; that they maintained a reasonable inventory of sugar, that they assessed no identifiable transportation charge and that the appellees do not hold themselves out to the general public to haul sugar for compensation, 219 F. Supp. 782 (R. 166-67).

The district court did not refer explicitly or implicitly to Section 203(c) of the Act. It did not cite any cases enunciating the "primary business test" as a basis for its decision. Moreover, the district court did not discuss the facts upon which the Commission based its determination that the appellees backhaul transportation of sugar was not within the scope and in the furtherance of a primary business enterprise other than transportation.

#### **4. The Interest of the Amicus Curiae**

The question before this Court is of great interest to the Private Carrier Conference, Inc. (PCC). PCC, affiliated with the American Trucking Associations, Inc., is a national organization of shippers who operate motor vehicles in interstate commerce incidental to, within the scope of, and in furtherance of non-transportation primary businesses. The several thou-

sand members of the Private Carrier Conference range from large manufacturing companies who operate hundreds of large motor vehicles to the local small businessman who utilizes trucks in local operations. Organized and existing as a non-profit corporation under the laws of the State of Delaware, POC maintains offices at 1616 P Street, N. W., Washington, D. C. The essential function of the Private Carrier Conference as a trade association is to preserve and maintain the right of shippers to choose on a free and unrestricted basis private carriage as a means of meeting their transportation needs in the United States.

Transportation by motor vehicle over the highways is an essential part of the national transportation system which the Interstate Commerce Act is designed to regulate, develop, and preserve. The correct interpretation of Section 203(c) and its relationship to other parts of the Act is vital to the maintenance of the national transportation system. This section of the Act codifies the "primary business test" enunciated in scores of Commission and court decisions prior to the codification of this test in the 1958 amendment to this section of the Act. The Commission and court cases prior to this codification and since which have utilized the "primary business test" as the touchstone of private carriage have received the unqualified support of the Private Carrier Conference which believes that this is the sole test that the Commission, the courts and the Congress intended should be used in determining and distinguishing private from other forms of carriage.

This brief, *amicus curiae*, is submitted not for the purpose of taking any position on the facts of this case

which the Conference is not going to do, but solely for the purpose of expressing the Conference's view that the outcome of this appeal should be determined solely by the relationship of the facts of the operation as presently or if the need arises as subsequently developed to the "primary business test." This brief, *amicus curiae*, is submitted with the consent of all parties to this appeal pursuant to the provisions of Rule 42(2) of this Court.

#### 5. The Consequences of an Adverse Decision

PCC is not taking any position as to whether this Court should affirm or reverse the district court decision in terms of the ultimate result reached by the district court. For this Court to follow either course without an express declaration that the "primary business test" as codified in Section 203(c) of the Act is the sole standard for distinguishing private from for-hire carriage could lead to a widespread disregard and disuse of the "primary business test" as the touchstone of private carriage. Decades of refinement of this test would be severely jeopardized. If this happened, the many thousands of private carriers in the United States could be faced with considerable uncertainty as to whether or not their particular operations might be subject to restrictive legislation redefining private carriage because of the disruptive economic effect of the district court decision on the regulated for-hire carriage industry. Since this is the first time this Court has been asked to interpret the effect of the 1958 amendment of Section 203(c) of the Act, the interest of the PCC is clear.

## SUMMARY OF ARGUMENT

The "primary business test" is the sole basis for distinguishing private from for-hire carriage. In concluding in the case at bar that the instant operations constituted private carriage, the district court committed serious error by not analyzing the operations against the "primary business test" codified in Section 203(c) of the Interstate Commerce Act. Only by so doing would the district court have been in a position, assuming an adequate record, to make a determination as to the classification of the carriage in question.

## ARGUMENT

**The History of the "Primary Business Test" Indicates That There Is No Other Test of Private Carriage**

At this time, the "primary business test" is the sole basis for distinguishing lawful private carriage from for-hire operations in interstate commerce. This test was developed over a period of three decades. Shortly after the Motor Carrier Act of 1935 was enacted into law and made a part of the Interstate Commerce Act, the Commission and the courts were faced with the necessity for adopting some standard or basis for distinguishing lawful private carriage from economically regulated forms of carriage, namely, common carriage and contract carriage, for which appropriate authority is required from the Interstate Commerce Commission. Inasmuch as, therefore, the "primary business test" as enunciated in the 1958 amendment to Section 203(c) of the Act was not utilized or alluded to by the district court, a discussion concerning the beginnings, development, and present status of the primary business test is in order.

The only definition of a private carrier originally included in the Motor Carrier Act of 1935 was Section 203(17). Section 203(17) of the Motor Carrier Act of 1935 reads as follows:

The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by vehicle" who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee; when such transportation is for the purpose of sale, lease, rent, or bailment; or in furtherance of any commercial enterprise.

The first case involving the question of private versus for-hire carriage in a situation where the identity of a carrier was not in question was *McBroom Contract Carrier Application*, 1 M.C.C. 425 (1937). This case interpreted the meaning of Section 203(a)(17) of the Motor Carrier Act in a situation involving a return or backhaul of commodities for sale at prices approximating their cost plus the cost of transportation. Using Section 203(a)(17) as the test, the Commission held that the backhaul, even though the applicant held title to the commodities, could not be accomplished without appropriate operating authority from the Interstate Commerce Commission. It is interesting to note that the very first case interpreting Section 203(a)(17) was one wherein the Commission was faced with a backhaul movement.

This case was decided early in 1937. Some five months later, the Commission decided two more cases: *Congoleum-Narin, Inc.*, 2 M.C.C. 237 (1937) and *Lyle H. Carpenter*, 2 M.C.C. 85, (1937). These three cases laid the basis for what has come to be known as



the "primary business" test". The Commission commented in the *McBroom* case (supra) at 1 M.C.C. 427 that:

Applicant purports to be transporting property of which he is owner for the purpose of sale. It will be noted from the . . . [definition of a private carrier], however, that this alone is not sufficient to make this transportation that of a "private carrier of property by motor vehicle," because it must also be established that he is not performing such transportation for compensation as a common or a contract carrier. Further inquiry would be necessary to arrive at a definite conclusion, but the evidence available strongly suggests that this back-haul transportation is in reality for compensation as a common carrier.

Expanding this, the Commission said in the *Lyle H. Carpenter* case (supra) at 2 M.C.C. 86 that:

A conclusion that the operation is that of a private carrier would lend sanction to the theory that a person who is engaged in the transportation of property by motor vehicle, for compensation, as his regular operation or business is not subject to appropriate regulation of his operations in interstate or foreign commerce if he elects to become the owner of the property throughout the course of its transportation by him. . . . [However], the specific definitions of carriers and the general policy declared in the act clearly warrant the conclusion that any person engaged primarily in the transportation of property in interstate or foreign commerce by motor vehicle, for compensation, is a common or contract carrier according to the nature of his undertaking, and is subject to regulation as such regardless of the ownership of the property transported. This conclusion is, of course, not applicable to motor vehicle operations which are merely incident to the conduct of some



other commercial enterprise, such as that of a mercantile or manufacturing concern.

In *Congoleum-Nairn, Inc.*, a manufacturer transported its manufactured goods among its own plants, between these plants and railroad or steamship loading facilities, and also from the plants to its customers. Title in the goods remained in the manufacturer until delivered to a railroad or steamship line for further transportation, or until delivered to the consignee in the case of direct deliveries. The Commission, in discussing this case, developed the other side of the test set forth in *Carpenter* when it said at 2 M.C.C. 240 that:

The facts of record clearly establish that applicant is not engaged primarily in the transportation of property and that it is in no sense a carrier for hire in its motor-vehicle operations. Such operations are conducted by it as an integral part of its business of manufacturing and selling the commodities described and are therefore clearly distinguishable from those described in . . . [the *Carpenter* case]. It is clear, therefore, that in these motor-vehicle operations, incidental to its private business, applicant is a private carrier within the terms of the . . . [private carrier] definition.

The Commission's "primary business test," as developed in the *McBroom*, *Carpenter*, and *Congoleum-Nairn* cases, may be expressed as follows: Any party primarily engaged in the transportation of property in interstate or foreign commerce by motor vehicle for compensation is a common or contract carrier, regardless of ownership of the property transported; but any party primarily engaged in a non-transportation business enterprise who transports property in motor

vehicle operations which are an integral part of, or incidental to, the conduct of his principal business is a private carrier. This test was applied consistently in numerous Commission decisions between 1938 and 1943.<sup>1</sup>

Reviewing thoroughly the many cases involving this aspect of the question of private versus for-hire carriage, the Commissioner said in a now famous case, *L. A. Woitishek*, 42 M.C.C. 193, 205-06 (1943) that:

After careful reconsideration of the entire subject, we are convinced that we should continue as in the past to determine all issues of for-hire versus private carriage on the basis of the operator's primary business. In so doing, we shall, of course, give appropriate consideration to the fact, when shown, that an operator receives compensation for transportation performed identifiable as such, but we do not think that such fact alone should be allowed to control our decisions. Neither does it follow that an operator having a bona fide

<sup>1</sup> *L. A. Woitishek*, 42 M.C.C. 193 (1943); *Robert McIntosh Howard*, 41 M.C.C. 551 (1942); *S. W. Pitchenik*, 34 M.C.C. 353 (1942); *Ulrich Oil Co.*, 34 M.C.C. 147 (1942); *Reyes Ogas*, 32 M.C.C. 437 (1942); *John H. Dull*, 32 M.C.C. 158 (1942); *Glosserman Chevrolet Co.*, 27 M.C.C. 471 (1941); *Enterprise Trucking Corp.*, 27 M.C.C. 471 (1941); *Intermountain Trucking Co.*, 26 M.C.C. 456 (1940); *Dan S. Dugan*, 26 M.C.C. 233 (1940); *Henry R. Rossmiller*, 22 M.C.C. 781 (1940); *James M. Youngson*, 21 M.C.C. 625 (1940); *Gustave Spanhake*, 21 M.C.C. 258 (1939); *Flois M. Murphy*, 21 M.C.C. 54 (1939); *Charles G. Monk*, 20 M.C.C. 115 (1939); *Thornburgh Sales Co.*, 20 M.C.C. 39 (1939); *Louis Sultan*, 18 M.C.C. 165 (1939); *Louis O. Cyr*, 17 M.C.C. 658 (1939); *Sterling Express, Inc.*, 17 M.C.C. 379 (1939); *Samuel O. Hammond*, 14 M.C.C. 711 (1939); *Durango Mercantile Co.*, 13 M.C.C. 789 (1939); *James Christy*, 13 M.C.C. 779 (1939); *Victor Swanson*, 12 M.C.C. 516 (1939); *Roger L. Howrigan*, 11 M.C.C. 455 (1939); *Economy Oil Co.*, 13 M.C.C. 427 (1938); *D. L. Wartena, Inc.*, 4 M.C.C. 619 (1938).

business other than transportation may not also be a carrier for hire if it appears that any transportation which he performs is not primarily in furtherance of his noncarrier interest but rather is performed with a purpose to profit from the transportation as such. In short, each case must be determined upon its own particular facts and neither the receipt of compensation for transportation identifiable as such nor the existing of some noncarrier business to which the transportation may be incidental is *alone* conclusive.

Before *Brooks Transportation Co. v. United States*,<sup>2</sup> the two most important cases involving the problem of private versus for-hire carriage were *ICC v. Clayton*<sup>3</sup> and *A. W. Stickle & Co. v. ICC*,<sup>4</sup> which support the "primary business test" approach.<sup>5</sup>

In the *Clayton* case, Clayton was engaged in the coal business, devoting one-third to one-half of his time to its sale, paying for the coal transported, owning it until he delivered it to a customer, and transporting it for the purpose of sale. He did not buy to fill a particular prior order but transported enough to take care of what he estimated would meet customer requirements. He filled orders as received, both from his loaded truck and from the coal stored in his yard, and made no differentiation in price between coal

<sup>2</sup> 93 F. Supp. 517 (E.D. Va. 1950), aff'd mem., 340 U. S. 925 (1951).

<sup>3</sup> 127 F. 2d 967 (10th Cir. 1942).

<sup>4</sup> 128 F. 2d 155 (10th Cir.), cert. denied, 317 U. S. 650 (1942).

<sup>5</sup> Others were *Beggs v. Kroger Co.*, 167 F. 2d 700 (8th Cir. 1948); *ICC v. Tank Car Oil Corp.*, 151 F. 2d 834 (5th Cir. 1945); *ICC v. Jamestown Sterling Corp.*, 64 F. Supp. 121 (W.D.N.Y. 1945); *Schenley Distillers Corp. v. United States*, 61 F. Supp. 981 (D. Del. 1945), aff'd per curiam, 326 U. S. 432 (1946).

delivered near his yard and that delivered to points requiring a longer haul. Price was determined by competitive conditions and he realized a profit, both from the transportation and from the sale of the coal, the margin of profit being large enough to cover both. The court found that Clayton was in the "bona fide coal business" and that the trial court was warranted in finding that he was a private carrier.

In the *Stickle* case, Stickle bought, transported, and sold lumber. Prior to the delivery to a customer and normally before the lumber had been purchased by Stickle, a contract would be entered into to sell the lumber to a customer and to transport it to the customer's yard. Thus, Stickle received pay both for the lumber and for its transportation to the customer. The major portion of Stickle's capital investment was in the transportation enterprise, the major portion of its payroll went to employees engaged in transportation activities, and its sale price was in excess of its purchase price by approximately the charge that would be made under established rates for the transportation of the lumber by a regulated common carrier. The court concluded that in substance and reality Stickle was engaged primarily in the transportation of lumber in interstate commerce and that it was a contract carrier within the meaning of the Act.

The fact that compensation for transportation was received in a form identifiable as such does not seem to have been controlling in either the *Clayton* or *Stickle* cases. Rather, the controlling question appears to have been whether the transportation was supplied with a purpose to profit from the transportation as such. *L. A. Woitishek*, 42 M.C.C. 193 (1943). There remained some question, however, as to whether a car-

rier, otherwise private, may receive, in addition to normal compensation for transportation performed, an additional profit from its motor carrier operations without thereby becoming a for-hire carrier. This question gave rise to the *Lenoir* case,<sup>6</sup> which in the courts became the *Brooks* case.<sup>7</sup>

In the *Lenoir* case the Commission recognized that there are a number of very good reasons, apart from a desire to set up a separate business for profit, which prompt mercantile or commercial concerns to conduct all or a portion of their own motor operations instead of relying on the services of for-hire carriers. Among those noted by the Commission were goodwill, control and exclusive use of carrier equipment, reduced loading problems, less rehandling of shipments, more certain delivery time, and less need for expensive packaging. The Commission went on to set forth the "primary business test," as it is now understood:

If the facts establish that the primary business of an operator is the supplying of transportation

<sup>6</sup> *Lenoir Chair Co.*, 48 M.C.C. 259 (1948), aff'd, 51 M.C.C. 65 (1949). The report on oral argument embraces *Schenley Distillers Corp.*, 48 M.C.C. 405 (1948), aff'd, 51 M.C.C. 65 (1949). Some cases relying on *Woitishek* and *Lenoir* before the courts passed upon the latter are: *Burlington Mills Corp.*, 53 M.C.C. 327 (1951); *Jacob Menzi*, 52 M.C.C. 109 (1950); *Dominic J. Sarmiento*, 52 M.C.C. 91 (1950); *Watson Mfg. Co.*, 51 M.C.C. 223 (1949); *Ralph P. Salyards*, 46 M.C.C. 303 (1946); *Tyrrell's, Inc.*, 44 M.C.C. 552 (1945); *Williams Bros.*, 44 M.C.C. 557 (1945); *Benjamin L. Klein*, 43 M.C.C. 451 (1944); *Teeter & Sons*, 43 M.C.C. 200 (1944); *Ira Marcellus*, 43 M.C.C. 128 (1944).

<sup>7</sup> *Brooks Transp. Co. v. United States*, 93 F. Supp. 517 (E.D. Va. 1950), aff'd mem., 340 U. S. 925 (1951). Since the *Brooks* case, two court cases in particular are difficult to reconcile. They are *Taylor v. ICC*, 209 F. 2d 353 (9th Cir. 1953), cert. denied, 347 U. S. 952 (1954), and *Scott v. ICC*, 213 F. 2d 300 (10th Cir. 1954).

for compensation, then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale. . . . If, on the other hand, the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. . . .

We do not mean that a private carrier may not under the law realize an incidental profit in the conduct of its motor carriage without forsaking or endangering its private carrier status. . . . Each case must be determined on its own facts."

The "primary business test" was directly at issue in the *Brooks* case wherein the Brooks Transportation Company and others brought suit to set aside the Commission's orders based on its finding that the Lenoir and Schenley concerns were not for-hire carriers. The facts were not in dispute. The three-judge district court considered the question of whether, whenever compensation for transportation is found, the carrier is, unless specifically excepted by a provision of the Act, a common or contract carrier. This has come to be known as the "compensation test." After considering the legislative history of the Act, the awareness by Congress of the Commission's "primary business test" and its failure to amend the Act, and the consequences of accepting the "compensation test," the court rejected it in favor of the "primary business test":

We deem it not inappropriate to consider what might be called the economic approach to the prob-

<sup>8</sup> 51 M.C.C. at 75.



lem before us, in the light of what might be called the felt needs and the best interest of the interstate carriers of goods by motor vehicle. In our considered judgment, such an approach strongly favors the *primary business test* as against the *compensation test*. And the problem before us is preeminently one that should be solved not by theoretical abstractions or excursions into juristic semantics but rather by practical common-sense. Just what type or measure of compensation was intended by Congress to bring the carriage within Section 203(a) (14) or (15) is best ascertained by the *primary business test*. And, in the application of this test, the motive to profit by the carriage and the relation of the carriage to the business involved are important elements.<sup>9</sup>

It was through affirmance of the *Brooks* case,<sup>10</sup> then, that the Commission's "primary business test" was approved by this Court.

Because of the alleged growth of illegal for-hire carriage of property by motor vehicle, resulting in an alleged erosion of the volume of traffic available for transportation by lawful public carriers, Congress attempted to protect both lawful private and for-hire carriers from motor carrier service which, although performed under the guise of private transportation, was actually public transportation.<sup>11</sup> It had in mind, in particular, the so-called buy-and-sell and back-haul operations performed only for the purpose of receiving compensation for the otherwise empty return of trucks.<sup>12</sup> To this end, Congress amended Part II of

<sup>9</sup> 93 F. Supp. at 525.

<sup>10</sup> 340 U.S. 925 (1951) (mem.).

<sup>11</sup> S. Rep. No. 1647, 85th Cong., 2d Sess. 23 (1958); H.R. Rep. No. 1922, 85th Cong., 2d Sess. 18 (1958).

<sup>12</sup> S. Rep. No. 1647, supra note 11, at 23-24 (1958); H.R. Rep. No. 1922, supra note 11, at 17-18 (1958).

the Act so all commercial carriage of property by motor vehicle in interstate or foreign commerce must, with certain specific exceptions, fall within one or another of three classes: duly certificated common carriage, duly permitted contract carriage, or carriage solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter.<sup>13</sup> Congress did not want to interfere with legitimate private carriage, but rather its purpose was to write the "primary business test", as contained in the *Brooks* case, directly into the Interstate Commerce Act.<sup>14</sup> A recommendation of the ICC that the definition of a "private carrier of property by motor vehicle" be amended was rejected, but, in order to keep the door closed to reconsideration of the concept of the "primary business test," Congress added, in 1957, a separate subsection numbered 203(c).<sup>15</sup> The subsection provides that:

... no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce . . . unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign

<sup>13</sup> S. Rep. No. 1647, *supra* note 11, at 24-25.

<sup>14</sup> *Id.* at 24-25; H.R. Rep. No. 1922, *supra* note 11, at 18. Some "primary business" cases before codification were *Carlton Housden*, 76 M.C.C. 671 (1958); *Ernest Braun*, 76 M.C.C. 124 (1958); *Dean S. Axtell*, reentitled *Caveman Transp., Inc.*, 76 M.C.C. 115 (1958); *Roy J. Vollbracht*, 76 M.C.C. 761 (1957); *E. G. Menelaus*, 72 M.C.C. 176 (1957); and *Jay Cee Transp. Co.*, 68 M.C.C. 758 (1956).

<sup>15</sup> 71 Stat. 411 (1957), as amended, 72 Stat. 574 (1958), 49 U.S.C. § 303 (c) (1958).

commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

This section as amended had the effect of codifying the "primary business test" as expressed in the *Lenoir* case regarding determination of what transportation activities are permitted within the scope of private carriage.<sup>16</sup>

Since the "primary business test" was codified, the Commission has considered a number of cases in which the test as set forth in the *Lenoir* case has been applied.<sup>17</sup> These cases show how the "primary business test" is now applied to determine the status of a particular carrier operation as a private or for-hire operation.

In one of these cases, *Subler*, a motor contract carrier operating under permits issued by the Commission authorizing transportation between certain points in seventeen states and the District of Columbia, transported sugar from sugar refineries in New York City, Philadelphia, and Baltimore to points in Ohio, West Virginia, and Michigan. *Subler* had no authority to perform this sugar transportation, its authority being limited to transporting various commodities from

<sup>16</sup> *Fraering Brokerage Co.*, 81 M.C.C. 337 (1959).

<sup>17</sup> E.G., *E. E. Mumbly*, 82 M.C.C. 237 (1960); *Fraering Brokerage Co.*, 81 M.C.C. 337 (1959); *L. F. Campbell*, 81 M.C.C. 223 (1959); *Subler Transfer, Inc.*, 79 M.C.C. 561 (1959); *Pettapiece Cartage & Builder's Supplies, Ltd.*, 79 M.C.C. 259 (1959); *Roy D. Yiengst*, 78 M.C.C. 96 (1958), rev'd on other grounds, 79 M.C.C. 265 (1959); *Riggs Dairy Express, Inc.*, 78 M.C.C. 574 (1958); *William P. Heyt*, 78 M.C.C. 437 (1958); *Cecil Payne Supply Co.*, 78 M.C.C. 405 (1958); *Monkem Co.*, 78 M.C.C. 152 (1958).

from points in the Midwest to points in the East. The sugar was transported under buy-and-sell arrangements and one of Subler's employees admitted that the purpose of such arrangements was to obtain additional westbound tonnage to balance the carrier's eastbound movements. As Subler had established a sales division within its corporate organization for the purpose of buying and selling sugar, it was argued that it was engaged in more than one primary business, including the merchandising of sugar, the leasing of equipment, and for-hire carriage. Hence the merchandising operations in sugar were supposedly not carried on for the purpose of obtaining return shipments to balance its for-hire carrier operation. The Commission, applying the test of the *Lenoir* case, said:

The record clearly establishes that Subler's primary business is that of a for-hire carrier, and that Subler began transporting the involved sugar, under arrangements with the respondent brokers herein, so as to obtain westbound traffic to balance its eastbound operations. . . . Subler's transportation activities in connection with these sugar transactions are not and have not been incidental to any bona fide nontransportation business, and the "Merchandise Sales Division" set up within its organization is nothing more than a subterfuge to avoid regulation. . . . Although it is entirely possible that a for-hire carrier can be engaged . . . in bona fide private carriage in furtherance of a separate noncarrier business, such is not the case here.<sup>18</sup>

While the *Subler* case stands as a clear example of a situation where, despite protestations to the contrary, the carrier was engaged primarily in the business of

<sup>18</sup> Subler Transfer, Inc., 79 M.C.C. 561, 569-70 (1959).

supplying transportation for compensation, the *Fraering case*<sup>19</sup> involved a carrier which was not engaged in transportation as a primary business. In this case, the important question was whether certain sugar transportation operations were in furtherance of the primary business of the carrier, or whether they were merely related or secondary enterprises conducted with the purpose of profiting from the transportation performed. In this case the Commission concluded that the purpose of the sugar transportation was to reduce the cost of transporting other commodities on reciprocal hauls, and that the challenged sugar transportation had only an indirect relation to the primary noncarrier business in furtherance of which the reciprocal haul was performed. Thus such transportation was in furtherance of contract carriage and only secondarily related to the primary noncarrier commercial enterprise of the carrier. It found, therefore, that as the reduction of the cost of transportation on the reciprocal haul constituted a profit, the operation was for-hire carriage within the licensing provisions of Part II of the Interstate Commerce Act.

In other cases, the primary business of the carrier was established on facts related to the operations under investigation. The pattern of elements which constituted the challenged enterprises determined, in essence, what the carrier's primary business was within the meaning of the "primary business test." The *Stutzman and Campbell cases*, subjects of a single Commission report<sup>20</sup> involved simple buy-and-sell trans-

<sup>19</sup> *Fraering Brokerage Co.*, 81 M.C.C. 337 (1959) (combined with *Emma Shannon*).

<sup>20</sup> *Virgil P. Stutzman*, 81 M.C.C. 223 (1959) (combined with *L. F. Campbell*).



actions. The transportation performed in connection therewith could have been consistent with either a purpose of profiting from the transportation itself or a purpose of furthering the transporters' purported dealerships in salt. Stutzman was found to be a for-hire carrier; Campbell was found to be a private carrier.

The major portion of Stutzman's capital investment consisted of motor vehicles. He maintained a token warehouse but did not maintain a stock of salt on hand for sale. Rather, he transported it directly from the mines to consignees in response to specific orders received. The payment obtained by him included the cost of the salt, a charge based on the actual transportation mileage, and a fixed charge for unloading. Campbell maintained a stock of various types of salt at his warehouse and usually filled orders from his stock inventory. From time to time he purchased sufficient stock to replenish his inventory and to meet anticipated or existing orders. All orders were obtained by Campbell through his own efforts, and ordinarily he obtained orders after he purchased his salt from the mines. The Commission resolved the question of the carriers' primary business without specific reference to the purpose of the transportation, an aspect of the question which on the facts presented required no discussion. It was evident that Stutzman's operation had all of the significant qualities of for-hire carriage. And, once it was established that Campbell's primary business was the buying and selling of salt, the Commission was able to find without discussion that the transportation was performed as an incident thereto and not merely as a profitable secondary enterprise.



In the *E. E. Mumby* case,<sup>21</sup> account was taken of the increasing number of cases of its type coming before the Commission, often involving sugar or some other fungible commodity. All secondary parties to the proceeding, as well as the carriers themselves, were ordered to cease and desist from participating in operations found to be unlawful. Included among the secondary parties interested in, or affected by, the operations were sugar refiners, brokers, flour millers, and a wholesale dealer in flour. They were found to have known, or to have had reason to know, that, from the nature of the arrangements in which they participated, the Mumby operations constituted a for-hire transportation service.

The Commission's determination of the Mumby's primary business and status from the pattern of elements constituting the challenged enterprise is an interesting application of the "primary business test." The Mumbys purchased the sugar transported, quoted a delivered price, employed, on occasion, brokers to sell sugar for them, extended credit to purchasers, assumed the risk of fluctuating market by purchasing the sugar under firm contracts extending over several months, and stored about 10% of the sugar at their warehouse for resale to some of their purchasers. But the prime service they rendered was the furnishing of motor carrier transportation, and the Commission found that the primary purpose of their sugar dealings was to profit from its transportation. The Commission also found that the Mumby's warehouse operation was dependent upon the transportation-motivated

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<sup>21</sup> *E. E. Mumby*, 82 M.C.C. 237 (1960).

sugar activities and hence was subordinate and merely incidental to their transportation business.<sup>22</sup> The Mumby flour transactions were much less complex, and the Commission found that they were entered into solely for the purpose of performing and profiting from transportation, and that, in fact, transportation was the only real service performed by the Mumbys.

Two court decisions reviewing the reports and orders of the Commission in buy-and-sell cases are *Church Point Wholesale Bev. Co. v. United States*, 200 F. Supp. 508 (W.D. La. 1961), sustaining, *Church Point Wholesale Beverage Co.—Investigation*, 82 M.C.C. 457, and *Cahaba Steel Co. v. United States*, not reported (C. A. No. 2669, S.D. Ala., January 17, 1962), sustaining, *Cahaba Steel Company—Investigation of Operations*, 86 M.C.C. 759 (1961).

In the former case the court at 200 F. Supp. 512, deemed the Commission to have accurately summarized the plaintiffs' sugar operations, as follows:

The purchasing and selling of truckloads of sugar is conducted in order to balance their motor vehicle operations from northern points where merchandise is purchased and transported southbound in connection with their wholesale operations in Louisiana. Sugar is purchased and transported to northern points only when need arises for a shipment of merchandise to supply their wholesaling activities. The sugar transactions are gen-

<sup>22</sup> The cease and desist order was not directed to the Mumbys' warehousing of sugar, and the Commission did not deny their right to distribute sugar from a warehouse and to provide transportation in connection therewith, provided that the warehousing was their primary business and the transportation performed was in furtherance of such valid nontransportation business.

erally handled through respondent, Fox, a broker for a sugar refinery in New Orleans, who contacts a representative for respondent wholesalers who act on their behalf on the sugar transactions. Fox arranges both for the purchase of the sugar by respondent wholesalers from the refinery and for the sale of the sugar by the wholesalers at northern points. Most of the sugar is purchased by respondent wholesalers from the refinery with pre-existing orders from the ultimate purchaser or consumer already on hand. None of the sugar is stored. Respondent wholesalers' vehicles are dispatched from their respective home terminals to the refinery at New Orleans, thence direct to the consumer's plant. The sugar is purchased by wholesalers from the refinery with their own funds and title rests with wholesalers during the transportation to the ultimate buyer.

The Commission distinguished between the nature of the plaintiffs' northbound transportation of sugar and their southbound transportation of groceries, liquor and beer at 82 M.C.C. 460-461, as follows:

We see two distinct business enterprises which, although related, possess distinct characteristics. On the one hand, there is the wholesaling business of each respondent wholesaler, wherein merchandise is kept in stock and is sold and distributed to their respective customers. In connection with this enterprise and in order to stock their warehouse with a minimum of inventory, respondent wholesalers operate line-haul equipment which is used to pick up merchandise from manufacturers and other sources as the need arises. On the other hand, there is another business enterprise conducted by each of the respondent wholesalers, namely, the buying and selling of sugar. Here no inventory is kept, their marketing area is hundreds of miles beyond that of their respective wholesaling businesses, and sugar is purchased,

transported to northern points, and sold only when a truckload of merchandise from some northern point is needed in connection with their respective beverage or grocery wholesaling activities.

After discussing the Commission's earlier cases, the "primary business test" and the enactment of Section 203(c) of the Interstate Commerce Act, the court, at 200 F. Supp. 516-17, said:

The language of the amendment is clear. Its purpose is unmistakable. The legislation clearly precludes all transportation conducted in connection with a commercial enterprise, unless the same is "within the scope" and "in furtherance of a primary business enterprise other than transportation." Both tests must be satisfied. Surely, plaintiffs' transportation of sugar to the midwest meets neither of these tests. The only relationship between the movement of sugar and plaintiffs' primary business of wholesaling is that the sums realized from the movement of the sugar serve to reduce the cost of conducting plaintiffs' other transportation activities. Surely, plaintiffs cannot be said to be in the business of the interstate wholesaling of sugar. Plaintiffs do not actively solicit customers for sugar, conduct no advertising of same, dispatch their trucks to carry sugar only when they are dispatched to pick up beer or groceries in the Midwest, and transport only sugar that is purchased under pre-existing orders. They have no investment in facilities other than equipment used in the transportation of the sugar and employ no personnel except those who drive the vehicles. The only service identifiable as such which plaintiffs actually perform for the ultimate purchaser of the sugar and from which they derive a profit is transportation.

The Commission's conclusion that plaintiffs' transportation of sugar falls within the prohibi-

tion of 203(c) is responsive to the plain language of the statute and is in complete accord with the Commission's construction thereof since its enactment. *Donald L. Wilson, et al.—Investigation of Operations*, 82 M.C.C. 651 (Div. 1, 1960); *Mumby Investigation of Operations*, 82 M.C.C. 237 (Div. 1, 1960); *Fraering Brokerage Co., Inc.—Investigation of Operations*, 81 M.C.C. 337 (Div. 1, 1959); *Stutzman—Investigation of Operations*, 81 M.C.C. 223 (Div. 1, 1959); *Subler Transfer, Inc.—Investigation of Permits*, 79 M.C.C. 561 (Div. 1, 1959); *Riggs Dairy Exp., Inc.—Investigation and Revocation*, 78 M.C.C. 574 (Div. 1, 1958); *Monkem Co., Inc.—Investigation of Operations*, 78 M.C.C. 152 (Div. 1, 1958).

#### CONCLUSION

Plaintiffs' transportation of sugar to Midwest destinations in order to be lawful, since it is unauthorized, must be within the scope and in furtherance of their primary business as distributors at wholesale of groceries, liquor and beer within Louisiana. The relationship between the two distinct operations is tenuous at best. While the northbound transportation of sugar reduces the allocation of round-trip costs assignable to the merchandise picked up for wholesale distribution in Louisiana, this economic benefit accruing to the noncarrier business enterprise of the plaintiffs is too remote to place such transportation within the regulatory exemption afforded private carriage by the Act. But for the mechanics of assuming title to the sugar they transport, there would be no question that the plaintiffs are engaged in for-hire carriage in their northbound transportation. They concede that they handle the sugar for the profit accruing therefrom. That such transportation additionally achieves certain economies and efficiencies beneficial to the plaintiffs' wholesaling activities is not controlling. Plaintiffs'



justification of their northbound transportation would make a nullity of the primary business test, expounded by the Commission, sustained by the courts and ratified by the Congress in the enactment of Section 203(c) of the Act, for it would permit any person engaged in any other business enterprise to transport property by motor vehicle, irrespective of whether such transportation is, in fact, within the scope or in furtherance of such person's primary business enterprise, if the performance of the transportation makes possible more profitable utilization of the equipment used in the primary business enterprise.

In the *Cahaba* case decided shortly after the *Church Point* case, the court by per curiam judgment and decree sustained the cease and desist order of the Commission, upholding its conclusion, at 86 M.C.C. 764-65:

The facts that title to the goods remains in the transporter until transportation is completed, or that the transporter assumes risk of damage or loss to the goods while in transit, or the maintenance by the transporter of a place of storage where some of the salt is held to await future purchases are not entirely controlling in determining the status of the operation. It is believed that the summarization shown in the letter reproduced in the appendix hereto, more particularly the third paragraph thereof clearly shows that the handling of salt is not a primary business of respondent and would not be continued if movements of steel to the origin areas of the salt were to be discontinued. . . . When, as here, a wholesaler of certain commodities transports such commodities in its own vehicles from point A in one State to point B in another State, it is engaging in bona fide private carriage, but when, to avoid an empty return haul, it buys certain goods at point B and transports them back to point A and there sells them, and where the evidence shows an intention



to profit from the return transportation as such, it is engaging in for-hire transportation subject to the certificate or permit requirements of the act. Compare, *Fraering Brokerage Co., Inc., Investigation of Operations*, 81 M.C.C. 337.

Recent applications of the test have proved that the Commission was right when, in the *Lenoir* case, it characterized the "primary business test" as one which affords an adequate criterion for the determination of a carrier's status, private or for-hire, despite the simplicity or complexity of fact in any particular case. The test has been approved by the courts and codified by Congress; its reasonableness is now beyond doubt.

### CONCLUSION

¶ In view of the history and development by the Commission and the courts as well as by the Congress of the "primary business test," the district court's failure to utilize this test and apply it to the facts developed on the Commission record constitutes serious error. Should this district court decision be allowed to stand without at least a change in the basis on which the decision was made, the "primary business test" as heretofore developed will be severely compromised.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1963

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No. 406

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RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants*,

v.

EMMA SHANNON AND RICHARD J. SHANNON, d/b/a  
E. AND R. SHANNON, *Appellees*.

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On Appeal from the United States District Court for the Western  
District of Texas, San Antonio Division

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**BRIEF FOR THE APPELLANTS\***

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**OPINIONS BELOW**

The opinion of the United States District Court for the Western District of Texas (R. 163-167) was handed down on April 24, 1963, and is reported at 219 F. Supp. 781. The report and order of the Interstate Commerce Commission (R. 17-38) is dated August 3, 1959, and appears at 81 M.C.C. 337.

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\* Appellants are listed in Appendix A.

## JURISDICTION

The judgment of the District Court (R. 168-169) was entered on May 1, 1963, and notice of appeal was filed in that Court by these appellants (R. 170-174) on June 27, 1963. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by the following decisions: *American Trucking Assos. v. United States, I.C.C.*, 364 U. S. 1 (1960); *Interstate Commerce Com. v. J-T Transport Co.*, 368 U. S. 81 (1961); and *United States v. Drum*, 368 U. S. 360 (1962). Probable jurisdiction was noted on November 12, 1963, and the case was consolidated with No. 421, an appeal from the same judgment by the United States and the Interstate Commerce Commission.

## STATUTE INVOLVED

In a very real sense this case involves the entire Interstate Commerce Act for there is at issue here the right, power, and duty of the Interstate Commerce Commission to bring to bear upon a particular factual situation its informed judgment in order to accomplish its assigned task of administering the Act so as to develop, coordinate, and preserve a national transportation system. More particularly, there is here involved Part II of the Act (the Motor Carrier Act of 1935, as amended) for the specific factual situation involves transportation by motor vehicle and the ultimate determination to be made is whether or not that transportation is subject to Commission regulation.

The provisions of the Act which are particularly pertinent are as follows:



National Transportation Policy, 49 U. S. C., preceding §§ 1, 301, 901, and 1001:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with the view of carrying out the above declaration of policy.

Section 203(c), 49 U. S. C. § 303(c), prohibiting for-hire transportation except as authorized by the Interstate Commerce Commission:

Except as provided in section 202(c), [transportation within terminal areas] section 203(b), [specific partial exemptions] in the exception in section 203(a)(14), [express companies] and in the second proviso of section 206(a)(1), [repealed, P. L. 87-805, 76 Stat. 911] no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any

public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Section 203(a)(14), 49 U. S. C. § 303(a)(14), defining the term "common carrier by motor vehicle":

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 203(a)(15), 49 U. S. C. § 303(a)(15), defining the term "contract carrier by motor vehicle":

The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continued period of time to

the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 203(a)(17), 49 U. S. C. § 303(a)(17), defining the term "private carrier of property by motor vehicle":

The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle," who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Section 206(a), 49 U. S. C. § 306(a), requiring a common carrier by motor vehicle to hold a certificate of public convenience and necessity:

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations \* \* \* \*

Section 209(a), 49 U. S. C. § 309(a), requiring a contract carrier by motor vehicle to hold a permit:

Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive

jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business \* \* \* \*

Section 204(c), 49 U. S. C. § 304(c), authorizing the Commission to determine whether the provisions of Part II of the Act are being violated:

Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of the opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

#### **QUESTION PRESENTED**

Whether the District Court may, without reference to applicable statutory provisions, set aside a Commission determination as to the nature of a transportation operation on the ground of lack of substantial evidence where there is no essential dispute as to the facts and where the court substituted its judgment for the Commission's as to the inferences to be drawn from the facts in light of the controlling statute.

**STATEMENT OF THE CASE**

This case arose upon the institution by the Commission on its own motion (R. 55) of an investigation of appellees' transportation operations for the purpose of determining whether those operations, or any part thereof, constitute unauthorized for-hire transportation or whether they are within the scope and in furtherance of a primary business (other than transportation) and thus constitute bona fide private carriage. After hearing, and upon consideration of undisputed evidentiary facts the Commission found and concluded that appellees were engaging in for-hire transportation of sugar in interstate commerce without appropriate authority and ordered them to cease and desist from such transportation activity. Upon suit by appellees the District Court, without reference to Section 203(c) of the Interstate Commerce Act, concluded that the Commission's decision was not supported by substantial evidence and set aside the Commission's order. From that judgment this appeal has been taken as has the appeal by the United States and the Commission in No. 421.

Appellants (listed in Appendix A) are authorized motor common carriers of property, railroads, and two associations of motor common carriers. They were permitted to intervene in support of the Commission order in the court below pursuant to the provisions of 28 U. S. C. § 2323. (R. 49, 161, 165). As originating or connecting lines the appellant common carriers are engaged in hauling sugar in the area of appellees' sugar transportation operations, and as common carrier members of the National Transportation System appellants have a vital interest in the interpretation and enforcement of those provisions of the Act which



are specifically intended to protect them from unauthorized competition.

The facts of the case as presented at the oral hearing are not in dispute, are relatively uncomplicated, and may be summarized rather easily. However, inasmuch as the Court below predicated its judgment on a conclusion that the Commission's decision is not supported by substantial evidence these appellants here set forth the statement of facts appearing in the Commission's report, 81 M. C. C. at pages 341-343 (R. 23-25), with the addition of record references to evidence supporting the factual statements:

"The facts pertaining to the business activities and transportation engaged in by the Shannons are as follows: E. and R. Shannon, with headquarters and a warehouse at San Antonio, have been engaged as a partnership in the business of buying and selling livestock since 1934, and in connection therewith have transported livestock as a bona fide private carrier. [R. 67, 68, 106, 107, 110] In or about 1951 their activities were expanded to include the purchase and resale of grain, fertilizer, molasses, and salt, and in 1954, of sugar. [R. 107] They operate seven trucks which are used in connection with some deliveries to customers of the commodities in which they deal. [R. 97, 99] On shipments of livestock and some other commodities (not including sugar) they use common carriers to some extent but have never used for-hire carriage for the transportation of sugar. [R. 115-116] No one questions but that the primary business of the Shannons is that of a dealer in livestock and related items above named except sugar, and that the transportation by them of all of the named commodities, except sugar, is primarily in furtherance of their main or principal business. [R. 67, 76] In dealings



which correspond with movements of livestock transported to destinations in southern Louisiana, the Shannons have been purchasing sugar, in 100-pound bags, from a refinery at Supreme, La., and transporting and selling it to purchasers, the majority of whom are located in San Antonio. [R. 67, 83-84, 111-113] The distance from Supreme to San Antonio is 525 miles. [R. 69] All purchases from the refinery are made on credit, subject to a 2-percent discount if payment is made within 10 days, and the sales by the Shannons at San Antonio are made on the same terms. [R. 84, 91-93, 109]

"An investigation by the Commission's district supervisor indicates that the sugar transported by the Shannons is customarily loaded at the refinery, moved directly and unloaded at the place of business of the purchaser, although sometimes loads are delivered to the Shannons' warehouse in San Antonio and subsequently sold to users in small lots of from 1 to 25 bags. [R. 68] At the hearing the dominant partner maintained that the sugar transported is never sold until after it has left Supreme and is en route to San Antonio; but there are some contrary indications of record, and it is clear that whenever sugar transportation is not coordinated with an appropriate backhaul, it is transported to fill an order obtained in advance. [R. 110-112] On one occasion the Shannons were forced to use a public warehouse for a truckload of sugar because of space limitations of their own warehouse and, generally, the record supports a finding that sugar sales usually are made by the Shannons after it is en route or has arrived at their warehouse. [R. 81-82, 109-111]

"Based on the going market price, a bona fide dealer at San Antonio will normally realize a profit of from 25 to 35 cents per hundred pounds of sugar. [R. 103] The Bureau submitted an exhibit

covering 15 truckloads of sugar transported by the Shannons from Supreme to San Antonio during the period from May to August 1956, on which the net profit to them, based upon the difference between the price paid at Supreme and that received at San Antonio, including transportation, ranged from 27 to 47 cents a hundred pounds, and averaged 35.74 cents per hundred pounds. [R. 60-61, Ex. 1, R. 62, 117-118] The Bureau argues that the profits realized by the Shannons from their sugar sales and those realized by bona fide sugar dealers at San Antonio are not directly comparable because the former are computed without regard to transportation costs whereas the latter necessarily allow for such costs. Compared to the Shannons' average profit of 35.74 cents per hundred including transportation, the record indicates that the applicable rail carload and motor truckload rates on sugar moving from and to the same point is 69 and 109 cents per hundred pounds, respectively. [Ex. 2, R. 62-63, 119-122; Ex. 3, R. 64, 122-126] The 15 truckloads listed by the Bureau were resold in San Antonio within from 1 to 2 days after their pickup at Supreme. [Ex. 1, R. 62, 117-118] The Shannons' explanation of the rapid turnover is that sugar is highly perishable, being particularly susceptible to damage by dampness; that it is subject to sudden and drastic price fluctuations; and that consequently all dealers make a practice of selling it as quickly as possible in order to forestall any loss. [R. 104-105, 108-109] They frankly admit, however, that the principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio and that in order to make a profit on the sugar haul they have to have traffic moving from San Antonio to Louisiana. [111-113]."

On the basis of the foregoing statement of facts the Commission reached its ultimate conclusion with a careful statement of its rationale. In so doing, the Commission discussed the "primary business" test, evolved by it early in motor carrier regulation, as applied in *Lenoir Chair Co. Contract Carrier Application*, 51 M. C. C. 65, and as sustained by this Court in *Brooks Transportation Company Inc., et al. v. United States of America, et al.*, 340 U. S. 925. The Commission also discussed the subsequent amendment of Section 203(c) which codified that test as the basis for determining what is or is not bona fide private carriage (R. 25-26). It then said that, as pertinent to this case, (81 M. C. C. at pp. 343-344, R. 26):

" \* \* \* It is our view that the principal question here, whether considered prior to or subsequent to the amendment of Section 203(c), inasmuch as \* \* \* the Shannons are [not] engaged in transportation as a primary business, is whether the sugar transportation operations of \* \* \* the Shannons are in bona fide furtherance of the primary business of the \* \* \* respondents, on the one hand, or, on the other, are conducted as related or secondary enterprises with the purpose of profiting from the sugar transportation performed."

With full recognition of the ultimate question to be resolved, the Commission analyzed the total body of facts in light of the applicable law. That analysis was carefully stated by the Commission and for purposes of judicial review thereof is itself an important fact. In pertinent part the Commission said (81 M. C. C. at pp. 346-347, R. 29-30):

" \* \* \* Although there are vague representations of record that the Shannons have transported

sugar from Supreme to some points in Texas on occasions when the shipments were not coordinated with backhauls of livestock or feeds, the dominant partner, in discussing such movements describes such a situation as one wherein they had an order, made a special trip to Supreme, and got 'more' money for hauling the particular load of sugar handled under the arrangement. This situation in itself constitutes for hire carriage within the doctrine of *Jay Cee Transport Co. Contract Carrier Application*, 68 M. C. C. 758, which holds, in part, that in a situation where a person actually does nothing but transport commodities from its suppliers to the users thereof, the fact that the person takes title to the goods is not sufficient to establish the person's status as a private carrier. The more usual arrangement under which they operate, however, appears to be one in which the Shannons have no preexisting sugar order, but buy with the intention of selling later either en route or after the transportation is accomplished. This procedure is ordinarily coordinated with a backhaul, and the purpose of their sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks which are moving in the opposite direction. We are satisfied that the purpose of their buying and selling sugar and the transportation thereof from Supreme to certain points in Texas is to reduce the cost of transporting other commodities outbound from San Antonio. Such reduction in the cost of transportation of the other commodities constitutes profit from the transportation of sugar from Supreme to the Texas points, and we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such. Inasmuch as their transportation of sugar makes their transportation of other commodities in the opposite direction more profitable, to this extent, it

is an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which their transportation of other commodities is performed. But it can, at most, be considered to be in furtherance of certain lawful private transportation operations of the Shannons, and only secondarily related to their primary business, which, again, is a noncarrier commercial enterprise. Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required; and we so find."

As will be observed from the foregoing the Commission found that appellees primary non-transportation business did not include dealings in sugar and that the only real relationship between appellees dealing in sugar and its primary business was in the transportation of sugar. The District Court, without any explanation whatsoever, assumed that appellees " \* \* \* are in the business of buying and selling livestock, in the feed mill business, and also buy and sell corn, oats, wheat, bran, molasses, sugar, salt, fertilizers, and everything in the feed line." (219 F. Supp. at p. 782, R. 166) The court gave no consideration whatever to section 203(c), similarly gave no consideration to appellees' primary non-transportation business and the relationship of sugar dealings thereto, but simply recited the relationship between plaintiffs' total assets and expenditures and those for transportation and described in cursory form plaintiffs' dealings in sugar. It then held that plaintiffs' "are in a general mercantile



business buying and selling many items, including sugar." (219 F. Supp. at p. 782, R. 167)

Thus the court below, without consideration of the controlling section of the statute disagreed with the Commission as to the weight to be accorded to and the inferences to be drawn from the undisputed facts and substituted its judgment for that of the Commission on an essentially factual question. To support its action the court declared, without rational explanation, that there is no substantial evidence to support the findings that appellees have been engaged in unlawful transportation of sugar as a common or contract carrier by motor vehicle, (219 F. Supp. at p. 782, R. 167) On review of the decision below it should be carefully remembered that at the oral hearing in this case appellees admitted that their principal reason for purchasing sugar in Louisiana is to provide a backhaul in connection with their outbound movements of livestock and other commodities from San Antonio. (R. 111-113)

#### SUMMARY OF ARGUMENT

The Interstate Commerce Act constitutes a comprehensive plan for regulation, with certain exceptions, of those engaged in transportation to the end of insuring the availability to the public of a stable, competent, and adequate system of public transportation. While the plan recognizes the right of those engaged in commercial activities other than transportation to perform for themselves the carriage which those activities require, it prohibits them from transporting commodities where the purpose in so doing is to profit from the transportation rather than to directly further their non-transportation commercial activities. Congress has delegated to the Interstate Commerce Commission



the authority to ascertain in each particular case whether a transportation operation is within the scope and in furtherance of a primary non-transportation business or constitutes for-hire carriage which is prohibited in the absence of specific authorization by the Commission.

Congress has recognized the adverse effect upon regulated carriers of transportation performed in avoidance of regulation either in the guise of private carriage or undertaken by otherwise bona fide private carriers for the purpose of enhancing or making more efficient the bona fide private carriage, and twice in recent years has, by amendment to the Act, confirmed the Commission's determination of the limits of bona fide private carriage and the authority of the Commission to enforce those limits. This case presents for square a paramount and growing national issue in transportation—the extent to which under the 1958 amendments to the Interstate Commerce Act highway transportation of goods may be conducted by one engaged in a business other than transportation without the necessity of obtaining operating authority therefor.

The Interstate Commerce Commission is empowered to determine whether particular transportation is, in fact, within the scope and in furtherance of a primary business enterprise other than transportation. When the Commission has concluded from an evidential record that an operation is not within the limits of private carriage its conclusion, when based upon substantial evidence, must stand. Here, the facts of appellees' business activities are disclosed on the record.

Appellees as wholesalers at San Antonio, Texas, deal in livestock, grain, fertilizer, molasses and salt, buying and selling these commodities and performing in the

conduct of this business some of their own transportation. Sometimes, after hauling a load of livestock by highway vehicle to Louisiana, they buy and back-haul to Texas a load of sugar. Rarely, if ever, is sugar bought and transported except as a back-haul, and, except in the rarest case, the sugar is sold before it reaches San Antonio. Thus the sugar is not ordinarily warehoused but is delivered directly to the purchaser. The admitted principal reason for buying the sugar in Louisiana is to provide a back-haul on the livestock run. In order to make a profit on sugar there must first be traffic moving into Louisiana.

From its review of the facts the Commission found that appellees' dealings in sugar were not within the scope or in furtherance of their primary non-transportation business but were undertaken for the purpose of profiting from the transportation performed. There being an abundance of evidence to support this finding it was error for the court below to substitute its judgment for that of the Commission. Moreover, it was error for the court below to fail to consider the explicit provisions of the statute as recently amended by Congress delineating the limits of private carriage pursuant to consideration of which the Commission's judgment was reached. Finally, it was error for the court below to fail to recognize the paramount goals of regulation and to consider whether the Commission's decision was in furtherance of the achievement of those goals. It is the task of the Commission to regulate transportation, and when its judgment is within the authority conferred upon it the exercise thereof should be sustained. Otherwise its authority will be seriously undermined and thereby its ability to perform the functions entrusted to it by Congress will be impaired.

## ARGUMENT

**Court Below Failed to Follow Established Construction of Interstate Commerce Act**

The court below at the outset of its opinion made appropriate reference to the jurisdictional and procedural provisions of the United States Code under which the action was brought. It also made reference to the provisions of the Interstate Commerce Act which require that common and contract carriers by motor vehicle held appropriate operating authority and which authorize the Interstate Commerce Commission to conduct investigations to determine whether the Act is being violated. But the court made no reference whatever to any other provisions of the Interstate Commerce Act, gave no consideration to the explicit prohibition contained in the Act against for-hire transportation without operating authority,<sup>1</sup> and failed to recognize the liberal construction of the Act required under the precedent decisions of this Court and a long line of lower Federal Court decisions.<sup>2</sup>

The Interstate Commerce Act is a broad, comprehensive statute which provides for regulation in the public interest of the various modes of surface transportation, i.e., transportation by rail is regulated under Part I, transportation by motor vehicle under Part II, transportation by water under Part III, and freight forwarder transportation under Part IV. Inasmuch

<sup>1</sup> Section 203(c).

<sup>2</sup> *McDonald v. Thompson*, 305 U.S. 263 (1939); *Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74 (1942); *Georgia Truck System v. Interstate Commerce Com'n*, 123 F. 2nd 210 (5th Cir. 1941); and *Lamb v. Interstate Commerce Commission*, 259 F. 2nd 358 (10th Cir., 1958).

as the case at bar involves transportation by motor vehicle the directly applicable statutory provisions are to be found in Part II, although those provisions must be construed in harmony with the entire Act of which they are a part.<sup>3</sup> It is immediately apparent from a reading of Part II and particularly of Sections 203, 206 and 209 (49 U.S.C. 303, 306 and 309) that, with certain specific exceptions, it was intended to and does forbid *all* for-hire transportation by motor vehicle in interstate commerce unless and until proper operating authority is issued by the Interstate Commerce Commission.

The obvious purpose of the Interstate Commerce Act is to maintain an adequate system of transportation made up of economically strong carrier components and to prevent deterioration of the economic strength of those components which would flow from subterfuges and devices designed and maintained to effectuate transportation beyond the pale of regulation. This Court in *United States v. Drum*, 368 U. S. 360 (1962), unequivocally confirmed the broad, remedial purpose of Part II of the Act when it said (368 U. S. at pages 373-374):

"The Motor Carrier Act of 1935 subjected many aspects of interstate motor carriage—including entry of persons into the business of for-hire motor transportation and the oversight of motor carrier rates—to administrative controls, on the premise that the public interest in maintaining a stable transportation industry so required. However, although aware that 'Both [contract carriers and common carriers] . . . are con-

<sup>3</sup> *United States v. American Trucking Associations*, 310 U.S. 534 (1940).

tinually faced with actual or potential competition from private truck operation . . . , Congress took cognizance of a shipper's interest in furnishing his own transportation, and limited the application of the licensing requirements to those persons who provide 'transportation . . . for compensation' or, under a 1957 Amendment, 'for-hire transportation.' The Commission, therefore, has had to decide whether a particular arrangement gives rise to that 'for-hire' carriage which is subject to economic regulation in the public interest, or whether it is, in fact, private carriage as to which Congress determined that the shipper's interest in carrying his own goods should prevail. This case is a recent instance of the Commission's developing technique of decision."

Though the Act speaks clearly for itself and though this Court has carefully announced its nature and purpose, whenever a decision of the Commission that a particular operation constitutes unauthorized transportation for-hire is challenged, as in the case at bar, sight must not be lost of the Congressional charge that the Act be administered so as

"\* \* \* to promote safe, adequate, economic, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; all to the end of developing, coordinating and preserving a national transportation system for water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States \* \* \*."

<sup>4</sup> National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901 and 1001.



And in considering the stated purpose and goals of Congress underlying the regulation of transportation it must be recognized that Congress has also charged the Commission with administering and enforcing all provisions of the Act in light of and consistent with its plain declaration of policy. Indeed, this Court has held that the "policy is the yardstick by which the correctness of the Commission's actions will be measured."<sup>5</sup> Unquestionably, the National Transportation Policy is the overriding, governing factor in cases involving transportation, and especially in cases involving a question as to whether a particular transportation operation is bona fide private carriage or is unauthorized for-hire transportation.

In view of the broad public interest in regulated transportation as expressed in the Act, the policy, and decisions of this Court, it is fundamental that any plan, scheme, or arrangement for engaging in transportation in interstate commerce beyond the scope of regulation must be carefully scrutinized. If the provisions of the Act could be lightly or easily avoided by imaginative plans, schemes, or arrangements, the purpose of regulation would be thwarted. Many decisions have recognized the validity of this premise but perhaps the principle has never been better expressed than by the Court of Appeals for the 5th Circuit in *Georgia Truck System v. Interstate Commerce Com'n.*, 123 F. 2d 210, 212 (1941), when the Court said:

" \* \* \* In the argument much refinement was indulged in, much speculation was raised, many authorities cited, as to how close one might approach

<sup>5</sup> *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957).



the line of transportation without being regarded as having stepped over it. We need not indulge here in any of these refinements. It is sufficient for us to say that the invoked statute is a highly remedial one, that its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire \* \* \* "

The particular question in the case at bar is the status in law of the transportation of sugar by appellees from Supreme, Louisiana, to San Antonio, Texas. Stated otherwise, the question is whether that operation is bona fide private carriage within the definition thereof,<sup>6</sup> or constitutes prohibited for-hire transportation under other provisions of the Act.<sup>7</sup>

Many years ago it was recognized that in scrutinizing a transportation operation to determine its status under the law the provisions for private carriage must be treated as in the nature of an exemption from a remedial statute. Thereby it was recognized that surface appearances or the good-faith intent of the operator must be disregarded in favor of a determination of what in substance is being accomplished and the effect thereof upon the Congressional plan for transportation regulation. For instance, in *Interstate Commerce Com'n v. A. W. Stickle & Co.*, 41 F. Supp. 268, 272-273

<sup>6</sup> Section 203(a)(17).

<sup>7</sup> Particularly the explicit prohibition of Section 203(c), and the requirements that operating authority be held by common and contract carriers as set forth in Sections 203(a)(14), 203(a)(15), 206(a), and 209(a).

(E. D., Okla. 1941), aff'd 128 F. 2nd. 155, cert. den. 317 U. S. 650, the Court said:

" \* \* \* The definitions of the three types of carriers must be read and considered together when classifying a carrier under a given state of facts. It must be assumed that Congress in defining a private carrier did not attempt thereby to afford a means or device whereby one might evade the provisions applicable to common or contract carriers. Yet approval of the Company's activities in this case as being those of a private carrier would afford an opportunity for many persons operating as common carriers or contract carriers to evade such a classification by the simple expedient of becoming commission merchants and acting as intermediaries between the wholesaler and his retail trade. It is the effect of the plan, of what is actually being done, rather than the designation of it by the person concerned or his good faith in endeavoring to engage in the transportation business as a private carrier, that is to govern if the beneficial results intended by the Act are to be attained." (Emphasis added)

Very recently, this Court in reviewing a District Court decision which had set aside a Commission determination that particular transportation operations were unauthorized for-hire transportation rather than bona fide private carriage, in substance reaffirmed the principles for interpretation and application of the Interstate Commerce Act set forth in the *Stickle* case. In *United States v. Drum*, supra, the Court in the most commanding language said (368 U. S. at pages 375-376):

" \* \* \* The statutory requirement that a certificate or permit be issued before any new for-hire carriage may be undertaken bespeaks con-

gressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market. Accordingly, the statutory definitions, while confirming that a shipper is free to transport his own goods without utilizing a regulated instrumentality, at the same time deny him the use of 'for compensation' or 'for-hire' transportation purchased from a person not licensed by the Interstate Commerce Commission. *Because the definitions must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal.* From the outset the Commission has correctly interpreted them as importing that a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume in significant measure the characteristic burdens of the transportation business. *The problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure. \* \* \** (Emphasis added)

It is eminently clear that judicial review of a Commission determination of the nature of a transportation operation must be limited by the terms of the statute and the purposes it was designed to fulfill. The error of the court below lies primarily in its failure to consider the applicable provisions of the Act. Before proceeding to demonstrate that error in detail, however, it will be well to discuss Section 203(c) in light of events which brought about its enactment in order to clearly establish its meaning, purpose, and applicability to the facts of the case at bar.

**Settled Standard for Distinguishing Between Bona Fide  
Private Carriage and For-Hire Carriage**

The critical issue presented to the Commission for resolution in the instant proceeding was whether certain operations of the appellees in the transportation of sugar were unlawful transportation for-hire or whether they constituted bona fide private carriage. The issue itself is not novel but, on the contrary, is one that has been repeatedly raised before both the Commission and the Courts. From the earliest days of motor carrier regulation the Commission has been faced with the necessity of determining whether transportation operations as disclosed by varying fact situations constituted private carriage beyond the scope of economic regulation or for-hire transportation subject to all relevant provisions of the Act.

In the administration and enforcement of the Act the Commission at the outset of motor carrier regulation evolved what has come to be known as the "primary business" test, and has consistently applied that standard ever since.<sup>8</sup> The most authoritative statement of the "primary business" test by the Commission is that found in *Lenoir Chair Co. Contract Carrier Application*, 51 M. C. C. 65 (1949), where the entire Commission, after oral argument, said (page 75):

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<sup>8</sup> See, *Carpenter Common Carrier Application*, 2 M.C.C. 85 (1937); *Congoleum—Nairn, Inc., Contract Carrier Application*, 2 M.C.C. 237 (1937); *Howrigan Contract Carrier Application*, 11 M.C.C. 455 (1939); *Swanson Contract Carrier Application*, 12 M.C.C. 516 (1939); *Spanhake Common Carrier Application*, 21 M.C.C. 258 (1939); *Dugan Extension of Operations—Nebraska Points*, 26 M.C.C. 233 (1940); and *Wolishkek Common Carrier Application*, 42 M.C.C. 193 (1943).

" \* \* \* \* If the facts establish that the primary business of an operator is the supplying of transportation for compensation then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale. Numerous cases involving operations of this character could be cited. If, on the other hand, the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. In our opinion, they cannot be both. A finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that the motor operations are conducted in bona fide furtherance of its other and primary commercial enterprise."

As enunciated in the *Lenoir Chair* case the "primary business" test was approved by this Court in *Brooks Transportation Company Inc., et al. v. United States of America, et al.*, 340 U. S. 325 (1951), in a per curiam decision affirming the judgment of a three-judge statutory court in *Brooks Transp. Co. v. United States*, 93 F. Supp. 517 (1950), which had affirmed the decision of the Commission in the *Lenoir Chair* case. It will be observed that the decision of this Court in *Brooks* was handed down in 1951, some six years prior to the Commission's hearing in the case at bar. Subsequent to that hearing, and at the request of the Interstate Commerce Commission as well as others interested in the development of an adequate transportation system,



the "primary business" test was expressly written into the Interstate Commerce Act by Congress.<sup>9</sup>

The striking similarity between the now effective language of Section 203(c) and the "primary business" test consistently applied by the Commission and approved in the *Brooks* case cannot fail to be noted. On its face the provision reveals that it is nothing more than the statutory embodiment of the time-tested standard long ago developed by the Commission. In addition, however, Congress, in adopting the "primary business" test in 1958 clearly specified its purpose and delineated some of the situations which the new statutory prohibition was intended to embrace.

**Congressional Intent Underlying Adoption of Primary Business Test Embraces Precise Fact Situation Here**

Seldom has a statutory provision come before this Court for the first time in a case where the legislative history of the provision makes it so unequivocally clear that the statute was intended to and does apply to the fact situation present in the case. The regulatory problem which caused the Interstate Commerce Commission to seek additional legislation, the agreement of Congress that the problem should be corrected, and the specific purpose of Congress in the legislation approved is well set out in the report of the Committee on Interstate and Foreign Commerce of the United States Senate recommending passage of the amendment to Section 203(c) where the Committee, *inter alia*, said (S. Rpt. No. 1647, 85th Congress, 2nd Sess. excerpt

<sup>9</sup> P. L. 85-625, approved August 12, 1958, amending Section 203(c), [49 U.S.C. 303(c)], 74 Stat. 574.



attached as Appendix A to report of Commission, 81 M. C. C. at pp. 348-350, R. 31-34) :

"A matter of serious concern to the subcommittee is the growing practice of persons engaging in the commercial transportation of property by motor vehicle under circumstances that do not constitute bona fide private carriage, as that term is properly understood, but that nonetheless enable them to evade the economic regulation to which common and contract carriers by motor vehicles are subject even though the transportation services performed are not specifically exempt from such regulation. Most frequently, perhaps, evasion of the economic regulation to which it is intended that all for-hire carrier transportation of property other than that specifically exempted shall be subject is accomplished under the guise of private carriage.

\* \* \* \*

*"Various subterfuges are employed to evade economic regulation and avoid imposition of the transportation excise taxes. \* \* \* Another is the backhaul method of operation increasingly engaged in by concerns that deliver in their own trucks articles which they manufacture or sell and then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or where they transport property they do not own, such transportation being performed only for the purpose of receiving compensation for the otherwise empty return of their trucks.*

"There are numerous variations but, whatever the precise nature of the subterfuge employed, carriage of this sort undermines the strength of the regulated for-hire carriers and in so doing it also injures the public which is largely dependent upon regulated for-hire carriage for its trans-

portation requirements. *Protection is needed from destructive competition of this kind.*

\* \* \* \*

"In the first session of the present Congress (Public Law 85-163, approved August 22, 1957) the Interstate Commerce Act was amended to prohibit one (except as otherwise specifically provided) from engaging in any 'for-hire transportation business by motor vehicle' in interstate or foreign commerce without a certificate or a permit authorizing such transportation. This prohibition is expected to prove helpful in correcting certain of the abuses described, but it appears that loopholes may still remain. What is needed, in the opinion of the subcommittee, is a further prohibition to the effect that no person in any commercial enterprise other than a duly authorized or specifically exempt for-hire transportation business shall transport property by motor vehicle in interstate or foreign commerce unless such transportation is solely within the scope and in furtherance of a primary business enterprise (other than transportation) of such person.

"With the Interstate Commerce Act amended in this way commercial highway transportation of property in interstate or foreign commerce would, with certain specific exemptions, be required to fall into one or another of three classes: (a) duly certificated common carriage, (b) duly permitted contract carriage, or (c) transportation solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter. Other commercial highway transportation, except as specifically provided would be prohibited. This, it is believed, would serve to correct most of the abuses that have arisen in the name of private carriage and yet would not in any way jeopardize or interfere with what might be called legitimate or bona fide private

carriage. Indeed, the 'primary business test' contained in *Brooks Transportation Co. v. U. S.* (340 U. S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute." (Emphasis added)

Equally as clear as the intended adoption of the "primary business" test is the concern of Congress with the problem of backhaul transportation.<sup>10</sup> That is, the problem of the bona fide private carrier transporting its own goods in one truck and then purchasing goods for backhaul transportation to be sold in the vicinity of the origin of the bona fide private carriage. In this situation it is perfectly plain that the sole purpose of the purchase and sale of the backhaul goods is to utilize motor-vehicle capacity on the return movement and that the only relationship between dealings in such goods and the bona fide primary business of the operator lies in the transportation thereof. This is what Section 203(c) as amended was intended to prohibit and this is precisely what the Commission found appellees in the case at bar to be doing.

The Committee on Interstate and Foreign Commerce of the House of Representatives was equally as explicit in recommending passage of the amendment to Section 203(c). That Committee said, *inter alia*

<sup>10</sup> The concern was observed by this Court in *United States v. Drum*, *supra*, p. 375, at footnote 12, in these words:

"That concern has found recent legislative expression in a 1958 amendment designed to curb so-called 'buy-sell' evasions by purported or 'pseudo' private carriers. \* \* \* See S. Rep. No. 1647, 85th Cong. 2d Sess. 23-24; H.R. Rep. No. 1922, 85th Cong. 2d Sess. 17-19."

(H. Rpt. No. 1922, 85 Cong., 2nd Sess., excerpt attached as Appendix B to Commission report, 81 M. C. C. at pp. 350-351, R. 34-37):

"The erosion of traffic of regulated carriers has also been caused to a considerable extent by the growth of 'pseudo-private carriage' by truck. \* \* \*

*"In addition, business [sic] which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost.*

*"The pseudo-private carriage is a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act. It constitutes a growing menace to shipper and carrier alike, and is not in the public interest. It is injurious to sound public transportation. It promotes discrimination between shippers and threatens the existing rate structures of regulated carriers. It makes possible the avoidance of payment of the Federal transportation of property tax, for this tax is not levied on the transportation of property owned by the carrier.*

*"In the Brooks case, the Supreme Court recognized the so-called primary business test as the governing criterion in establishing bona fide private carriage. Under the doctrine, if transportation is performed in furtherance of the primary*

business of the operator, even though a charge may be made for such service, the transportation is treated as bona fide private carriage. If, however, a bona fide noncarrier business is not established, the transportation is treated as for-hire.

\* \* \*

"Under these circumstances several witnesses recommended, and this committee favors, the further amendment to section 203(c) of the act contained in section 7 of the reported bill. This amendment provides that no person shall, in connection with any other business enterprise, transport property by motor vehicle in interstate or foreign commerce unless such transportation is incidental to, and in furtherance of, a primary business enterprise (other than transportation) of such person. There is no intention on the part of this committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in the Brooks case." (Emphasis added)

A fair reading of the report of both committees of Congress indicates the legislative view that backhaul transportation which is at best only incidentally related to the primary noncarrier enterprise should not be permitted within the scope of legitimate private carriage. Both Committees considered such arrangements as a subterfuge for the purpose of engaging in for-hire transportation beyond the pale of regulation, and both committees clearly expressed their belief that such subterfuges were violations of the Interstate Commerce Act. And the 1958 amendment has been held to have been effective to accomplish the Congressional purpose. In *Church Point Wholesale Bee. Co. v. United States*, 200 F. Supp. 508 (W.D. La. 1961) a three-judge statutory court affirmed a decision of the Interstate Commerce Commission that sugar transpor-



tation under facts remarkably similar to the case at bar constituted unauthorized for-hire carriage. After reviewing the legislative history of Section 203(c) as amended in 1958, the three-judge court concluded (200 F. Supp. at page 517):

"Plaintiffs' transportation of sugar to Midwest destinations in order to be lawful, since it is unauthorized, must be within the scope and in furtherance of their primary business as distributors at wholesale of groceries, liquor and beer within Louisiana. The relationship between the two distinct operations is tenuous at best. While the northbound transportation of sugar reduces the allocation of round-trip costs assignable to the merchandise picked up for wholesale distribution in Louisiana, this economic benefit accruing to the noncarrier business enterprise of the plaintiffs is too remote to place such transportation within the regulatory exemption afforded private carriage by the Act. But for the mechanics of assuming title to the sugar they transport, there would be no question that the plaintiffs are engaged in for-hire carriage in their northbound transportation. They concede that they handle the sugar for the profit accruing therefrom. That such transportation additionally achieves certain economies and efficiencies beneficial to the plaintiffs' wholesaling activities is not controlling. *Plaintiffs' justification of their northbound transportation would make a nullity of the primary business test expounded by the Commission, sustained by the courts and ratified by the Congress in the enactment of Section 203(c) of the Act, for it would permit any person engaged in any other business enterprise to transport property by motor vehicle, irrespective of whether such transportation is, in fact, within the scope or in furtherance of such person's primary business enterprise, if the performance of the transportation makes possible*



*more profitable utilization of the equipment used in the primary business enterprise."* (Emphasis added)

In spite of the fact that the report of the Commission discussed the "primary business" test and the enactment of Section 203(c), and in spite of the fact that the significance of this long-standing test and its codification by Congress was argued in the court below by the parties the court chose to utterly disregard this applicable law. Manifestly, Section 203(c), as amended, was intended to embrace the precise fact situation present in this case. In refusing to recognize this the court exceeded the permissible bounds of judicial review and erroneously set aside the decision of the Interstate Commerce Commission.

**Court Below Failed to Consider Purpose and Requirements of Statute and Erroneously Substituted Its Judgment for That of the Commission**

The failure of the court below to consider the controlling principles and provisions of law, i.e., the standard for distinguishing between private carriage and for-hire carriage as established in case law and as codified in 1958, is readily apparent from the opinion of the court where no reference whatever to the distinction or the criteria for determining the nature of a particular operation appears. In setting aside the decision of the Commission, it is plain that the court applied an improper standard for it failed to treat with the relationship between appellees' dealings in sugar and their livestock and feed business. Rather, the court assumed, without explanation and in contradiction of the express findings of the Commission, that appellees were engaged in a single business enterprise which included dealings in sugar. The court then com-

pared the assets and expenditures of appellees devoted to transportation with those devoted to non-transportation activities and concluded that transportation was not a significant part of the total. On the strength of this conclusion, coupled with the fact that in appellees' transportation of sugar there is no specific charge for transportation identifiable as such and no apparent holding out to transport for the general public, the court reiterated its initial assumption to the effect that appellees are engaged in a general mercantile business including the buying and selling of many items including sugar. With this as a predicate the court went on to state that there is no substantial evidence to indicate that appellees were transporting sugar as common or contract carriers by motor vehicle and that the Commission in finding them engaged in unauthorized transportation for-hire had exceeded its lawful authority.

When the decision of the court below is contrasted with the careful statement of facts and the thorough analysis of those facts in the Commission's report it is apparent that the court below has vastly exceeded the permissible limits of judicial review as laid down by this court in numerous decisions. Thus, in *Georgia Pub. Serv. Commission v. United States*, 283 U.S. 765, 775 (1931), this Court said:

" \* \* \* It is not our province to inquire into the soundness of the Commission's reasoning, the wisdom of its decisions, or the consistency of its conclusions with those reached in similar cases. \* \* \* "

And in *Merchants Warehouse Co. v. United States*, 283 U.S. 501, 508 (1931), this Court held:

" \* \* \* The credibility of witnesses and weight of evidence are for the Commission and not for the

courts, and its findings will not be reviewed here if supported by evidence. \* \* \*

Similarly, in *Swift & Co. v. United States*, 343 U.S. 373, 382 (1952), this Court said:

"Whether [a system of operation is proper] \* \* \* is a question committed to the administrative judgment of the Commission. When that judgment is based on findings abundantly supported by the evidence on the whole record, as it is in this case, it is the duty of the courts to sustain it. \* \* \*"

Demonstrative of the error in the case at bar is the fact that the court below apparently did not credit the evidence supporting the Commission's findings, for it summarized only that portion of the evidence which the court believed tended to support the court's contrary conclusion. Thereby, the court breached the principle embodied in this court's statement in *Chicago, St. P. M. & O. R. Co. v. United States*, 322 U.S. 1, 2-3 (1944) where the following appears:

"\* \* \* The court below examined the evidence as to each challenged finding and found each 'not unsupported by evidence.' It declined, quite properly, to substitute inferences of its own for those drawn by the Commission from testimony and declined to weigh anew conflicts in it. This was no error, and we affirm the findings. \* \* \*"

Not only did the court below improperly declare the Commission's findings to be lacking in substantial evidential support without an examination of the evidence, but also it compounded its error by substituting its judgment for that of the Commission on a question peculiarly committed to that agency. Just as a finding that a rate or practice is unreasonable is a determina-

tion of fact to be made by the Commission,<sup>11</sup> and just as the question of whether preference or discrimination is undue or unjust is ordinarily left to the Commission for determination as a question of fact,<sup>12</sup> so, too, is the question of determining whether a particular transportation operation is bona fide private carriage or unauthorized for-hire carriage a matter committed to the Commission for determination as an essentially factual question.

Speaking of the status which a reviewing court should accord to a Commission decision in *East Texas Lines v. Frozen Food Express*, 351 U.S. 49, 54 (1956) this court said:

"The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates. \* \* \*"

And of greater significance to the instant case is the proposition that where the Commission's decision is supported in evidence a reviewing court should sustain that decision even though on the basis of the evidence it might have reached a different conclusion. In *Swayne & Hoyt v. United States*, 300 U.S. 297, 304 (1937), the proposition was explicitly stated when this Court said:

"Such determinations [of fact by the I.C.C. or Shipping Board] will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not au-

<sup>11</sup> *Virginian R. Co. v. United States*, 272 U.S. 658, 665 (1926).

<sup>12</sup> *Nashville, C. & St. L. R. v. Tennessee*, 262 U.S. 318, 322 (1923).

Authorized to substitute its own for the administrative judgment. \* \* \*

The failure of the court below to consider the established standard for determining the nature of transportation operations, its failure to consider the evidence supporting the Commission's findings, and its substitution of judgment for that of the Commission suggest that the court fell into the same error as did the District Court in *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-536 (1946). There, in reversing the lower court this Court clearly delineated the proper limits of judicial review of an Interstate Commerce Commission decision when it said:

"We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true as the opinion stated, that ' \* \* \* the courts must in a litigated case be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

As stated above, the court below glossed over evidentiary facts recited and considered by the Commis-

sion, and, in reaching its conclusion the court overlooked the careful sifting and weighing of evidence disclosed in the Commission report. It is significant that the transportation and related handling of sugar by appellees did not begin until 1954, ~~some~~ three years after the addition of other commodities naturally related to appellees' feed and livestock business had ceased. Further, while appellees sometimes use the services of common carriers, both rail and motor, for the transportation of the other commodities in which they deal, sugar alone is *always* transported in appellees' own vehicles. And such transportation *always* corresponds with outbound movements of livestock transported by appellees from Texas to points in southern Louisiana, near Supreme, the origin of the sugar movements.

It is important too, that the length of the sugar haul from Supreme to San Antonio is 525 miles. An outbound movement of 525 miles where the dealing in feed and livestock is unquestionably a primary non-transportation business is an integral set of economic facts. Whether the highway vehicle will return empty for the entire 525 miles, or whether it will be utilized to transport sugar in order to reduce the cost of the round-trip movement presents a different set of economic facts. And to this distinction the Commission attached importance for clearly this is the back-haul situation which Congress considered as pseudo private carriage and intended to prohibit by Section 203(c) as amended in 1958.<sup>13</sup>

The foregoing facts are not exhaustive of those weighed by the Commission. For instance, the Com-

<sup>13</sup> See Appendices A & B to Commission Report, 81 M.C.C. at pp. 348-351, R. 31-37.



mission also considered the fact that sugar is customarily loaded at the refinery, moved directly to and unloaded at the place of business of the purchaser. In the infrequent situations when sugar is transported to appellees' warehouse it is sold, not in truckload lots, but in quantities varying from 100 pounds to 2500 pounds. And in those instances when the transportation of sugar is not coordinated with an outbound movement of livestock it is transported to fill an order obtained in advance *and for more money*. The Commission also considered, as the court did not, appellees' frank admission that the principal reason for purchasing sugar at Supreme is to provide a back-haul in connection with outbound movements of livestock and other commodities from San Antonio and that in order to make a profit on the sugar haul it is necessary to have the outbound movements from San Antonio to Louisiana.

While the court below related a few of the facts considered by the Commission it completely overlooked the picture disclosed by the facts as a whole. It is for the Commission to consider and weigh the evidence and to draw factual conclusions therefrom and those conclusions are not to be overturned when there is evidence supporting them even though a court considering the matter *de novo* might have reached a different conclusion. As this Court said in *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65 (1945), the Commission is clothed with broad discretionary power "to draw its conclusions from the infinite variety of circumstances which may occur in specific instances." Certainly, it is error for a reviewing court to set aside a decision of the Commission upon consideration by the court of isolated fragments

of evidence where the Commission's own report discloses consideration of all the evidence. As was said by this Court in *United States v. Drum*, supra (368 U.S. at page 384):

*"\* \* \* We deal in totalities; indicia are instruments of decision, not touchstones. The Commission allowably dealt with this novel situation as an integral and unique problem in judgment, rather than simply as an exercise in counting commonplaces. Nor did it leave the basis for its decision unarticulated."* (Emphasis added)

**Commission Consideration Flows Logically From Facts and Is In Furtherance of Congressional Policy**

The nature of the business and the operations conducted pursuant thereto by the appellees are clearly established of record. It is virtually beyond dispute that appellees transport sugar solely for the purpose of securing a payload for vehicles which would otherwise return empty to San Antonio. To secure sugar for transportation appellees purchase it from the refinery in Supreme and sell it to buyers in the San Antonio area. The period between the purchase by appellees and the sale by appellees is extremely short, usually one or two days, and the total transaction is usually completed while the sugar is enroute from the refinery to San Antonio. Except in a very few instances the sugar as a general proposition is delivered directly to the San Antonio purchasers and the only significant function performed by appellees is the interstate transportation from the refinery to the place of business of the ultimate purchaser. They perform no service from which they could reasonably gain a profit except the service of transportation. This is a significant fact supporting the finding that as to the sugar appellees'

primary business is transportation for-hire in interstate commerce.<sup>14</sup>

To properly determine the legal nature of appellees' sugar transportation it is necessary to evaluate the evidence in light of the provisions of Section 203(c) of the Act. This the Court below did not do. That Section prohibits the transportation of property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope and in furtherance of a primary business enterprise, other than transportation, of the operator. That is to say, the commodities transported must have some relationship to a primary non-transportation enterprise other than the transportation itself. Lacking such a non-transportation relationship the transportation of commodities in the reverse direction of bona fide movements in private carriage falls squarely within the situations decried by the Interstate and Foreign Commerce Committees of both the House and the Senate in their reports recommending passage of legislation to codify the "primary business" test.<sup>15</sup>

In the case at bar the Commission found on the basis of the evidence that appellees are engaged in the feed and livestock business. Dealings in sugar for human consumption have no natural relationship to that business and the record discloses that appellees deal in sugar in order to load their vehicles for return movements following outbound shipments of feed and livestock. There is clearly ample evidence to support the

<sup>14</sup> Cf. *Scott v. Interstate Commerce Commission*, 213 F. 2d 300 (10th Cir., 1951).

<sup>15</sup> See Appendices A and B of the Commission report, 81 M.C.C. at pp. 348-351, R. 31-37.

Commission's ultimate conclusion that the transportation of sugar by appellees is unauthorized for-hire transportation.

In view of the mandate of the National Transportation Policy to foster sound economic conditions in transportation and among the several carriers and to encourage the establishment and maintenance of reasonable charges for transportation services, and further in view of the recognition of Congress, the Commission, and the Courts that transportation in evasion of regulation impairs the achievement of the purposes of the Interstate Commerce Act, it is apparent that the conclusion reached by the Commission in the case at bar is in accord with Congressional policy. Equally apparent is the fact that the decision of the court below is not in furtherance of the Congressional policy and would strike a serious blow against the carefully conceived Congressional plan for transportation regulation. As recognized by the court in *Interstate Commerce Com'n v. A. W. Stickle and Co.*, *supra*, some twenty-three years ago, approval of activities such as appellees' transportation of sugar would afford an opportunity for persons acting as for-hire carriers to exceed regulation by the simple expedient of becoming commission merchants and acting as intermediaries between producers and their consuming customers. The plain purpose of the primary business test long followed by the Commission and now explicitly approved by Congress and made a part of the Act is to prevent the erosion of traffic from regulated carriage by pseudo-private carriage such as that disclosed on this record.

## CONCLUSION

The Court below has declared that the Commission's findings on an essentially factual question committed to the Commission by Congress are not supported by substantial evidence and has substituted its judgment for that of the Commission as to the ultimate conclusion which should be reached. And it has reached this result on the basis of a recital of mere fragments of the evidence without consideration of the evidence as a whole and without consideration of the explicit provisions of the Act which control the determination of what is and is not lawful private carriage. A review of the record as a whole discloses that there is evidence supporting every statement of fact contained in the Commission's report and thereby there is substantial evidence supporting the Commission factual conclusions.

It being apparent that there is substantial evidence supporting the Commission's findings and ultimate conclusion it is clear that the court below committed error in setting aside the Commission's decision for, "so long as there is warrant in the record for the judgment of the expert body it must stand."<sup>16</sup> Moreover, the Commission report discloses a most careful and thorough evaluation of the evidence and sets forth a clear statement of the rationale which led the Commission to its conclusion. Certainly it cannot be said that the basis upon which the Commission proceeded is either undisclosed or unintelligible nor can it be said that the conclusion reached is beyond the Commission's authority in view of the provisions of the Act which Congress has charged it to administer. There-

<sup>16</sup> *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 145-146 (1939).

fore, it is clear that the court below exceeded the permissible limits of its own authority in setting aside the Commission's decision for "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."<sup>17</sup>

WHEREFORE, the appellants listed in Appendix A respectfully pray this Honorable Court to reverse the judgment of the court below and to remand the case with instructions to dismiss the complaint.

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DATED: February 12, 1964

<sup>17</sup> *Mississippi Valley Barge L. Co. v. United States*, 292 U.S. 282, 286-287 (1934).



**APPENDIX A**

The following intervening defendants in the Court below do hereby participate in this Brief:

- (1) Red-Ball Motor Freight, Inc.
- (2) Brown Express, Inc.
- (3) Texas-Arizona Motor Freight, Inc.
- (4) Central Freight Lines, Inc.
- (5) The Atchison, Topeka and Santa Fe Railway Company
- (6) Chicago and North Western Railway Company
- (7) Chicago, Burlington & Quincy Railway Company
- (8) Chicago Great Western Railway Company
- (9) Chicago, Milwaukee, St. Paul and Pacific Railroad Company
- (10) Chicago, Rock Island and Pacific Railroad Company
- (11) Great Northern Railway Company
- (12) Illinois Central Railroad Company
- (13) The Kansas City Southern Railway Company
- (14) St. Louis-San Francisco Railway Company
- (15) Soo Line Railroad Company
- (16) Union Pacific Railroad Company
- (17) Wabash Railroad Company
- (18) The Western Pacific Railroad Company
- (19) Texas Tank Truck Carriers Association, Inc.
- (20) Regular Common Carrier Conference of American Trucking Associations, Inc.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1963.

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No. 421

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

EMMA SHANNON & RICHARD J. SHANNON, D/B/A  
E. AND R. SHANNON, ETC.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF TEXAS—SAN ANTONIO DIVISION.

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## **BRIEF FOR THE APPELLANTS**

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### **OPINIONS BELOW**

The opinion of the district court (R. 163-167) is reported at 219 F. Supp. 781. The report of the Interstate Commerce Commission (R. 17-31) is reported at 81 M.C.C. 337.

### **JURISDICTION**

The judgment of the district court was entered on May 1, 1963 (R. 168). The United States and the Interstate Commerce Commission filed their notice of appeal on July 1, 1963 (R. 175). This Court noted probable jurisdiction on November 12, 1963 (375 U.S. 901; R. 178). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

(1)



### STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, 49 U.S.C. 301, *et seq.*, are set forth in the Appendix, *infra*, pp. 35-57.

### QUESTION PRESENTED

Whether the district court applied an erroneous standard in determining, under Section 203(c) of the Interstate Commerce Act, that appellees' motor transportation of sugar was "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" and thus was exempt private carriage, rather than for-hire transportation requiring authority from the Commission.

### STATEMENT

This case grows out of a proceeding instituted by the Interstate Commerce Commission to determine whether the appellees' motor transportation of sugar constituted carriage for-hire rather than private carriage, and therefore was illegal because performed without operating authority from the Commission.

1. The partnership of E. & R. Shannon, with headquarters in San Antonio, Texas, has been engaged in the business of buying and selling livestock since 1934. About 1951, its activities were expanded to include the purchase and resale of fertilizer, feed grain, molasses and similar items in the feed line; and, since 1954, appellees have also engaged in sugar dealing (R. 23; 106-107). Appellees operate seven trucks which they use for the transportation of these goods. On shipments of livestock, feed grains and related items—but not sugar—appellees also use com-

mon carriage to some extent (R. 23, 115-116). It is conceded that, in transporting the items other than sugar, the appellees are acting in furtherance and within the scope of their primary commercial enterprise and are engaged in lawful private carriage (R. 23).

The appellees' dealings in sugar were developed in order to provide return cargo for their trucks which make deliveries of livestock or other merchandise at or near the site of a sugar refinery at Supreme, Louisiana, located about 525 miles from San Antonio (R. 29, 112-113, 132). Three of their trucks were so used (R. 97-98). The sugar is bought when one of their trucks which has made a delivery near Supreme would otherwise return empty to San Antonio (R. 23-25, 29). Usually, the sugar is sold by the appellees while it is in transit from the refinery and within a day or two of the date on which it is picked up (R. 24, 29, 68, 117-118). Most of the sugar is handled in truckload lots and is sold and delivered directly to ultimate consumers, principally wholesale grocers, candy companies, bottlers and dairies in the San Antonio area (R. 66-67, 70, 83; Ex. 1, R. 118),<sup>1</sup> without processing or warehousing by the appellees (R. 23-24, 68). At no time have the appellees bought or sold sugar which they have not transported in their own trucks (R. 115). A small quantity of sugar is generally on hand and sold from the warehouse in lots of from 1 to 25 bags (R. 23, 69, 80-81). This, in many instances, results from the failure of an expected purchaser of a truckload to buy (R. 108, 110-111). The appellees maintain their ware-

<sup>1</sup> Ex. 1 was received in evidence at R. 62.

house primarily for the processing or storage of grains, feeds or fertilizers (R. 75, 87-88, 166).

Appellees' gross average return from handling sugar between San Antonio and Supreme is about 35 cents per hundred pounds over the cost of sugar at the refinery, a return which must also cover transportation (R. 24; Ex. 1, 117-118). The average profit of sugar dealers at San Antonio was 25 to 35 cents per hundred pounds *after* transportation costs; and the common carrier rates for the transportation of sugar from Supreme to San Antonio (about 525 miles) are 69 cents per hundred pounds on rail car-load shipments and \$1.09 per hundredweight in truck-load shipments (R. 24, 78; Exs. 2 and 3, R. 119-126). Beet sugar from Colorado and California and occasionally from Canada is offered in the San Antonio area at prices competitive with those at which appellees sell Louisiana sugar (R. 108).

At the prevailing price of sugar in the San Antonio area, the appellees could not dispatch empty vehicles to the refinery for loads of sugar and maintain a profit margin. Appellees concede that their sugar operations are profitable only because of the backhaul availability of their trucks which have completed deliveries of other commodities at or near Supreme and which otherwise would be returned empty to San Antonio (R. 24-25, 29, 112). Occasionally, the appellees do send their trucks empty to Supreme to satisfy special prior orders of sugar, but only "where we get a lot more money" (R. 112). They acknowledge that

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<sup>2</sup> Exs. 2 and 3 were received in evidence at R. 63 and 64, respectively.

normally they could not so operate profitably, and that, in their handling of sugar, they are "backhauling to make money \* \* \* backhauling to make a profit" (R. 29, 112-113).

2. The Commission held that the appellees' transportation of sugar, unlike their transportation of livestock, feeds and fertilizers and related items, was not within the scope and in furtherance of a non-transportation business and hence was not lawful private carriage. It ordered appellees to cease and desist from continuing their transportation of sugar in the manner described, unless and until they obtained the requisite operating authority from the Commission (R. 25, 30).<sup>1</sup>

The Commission pointed out that, under Section 203(c) of the Interstate Commerce Act, the basic criterion for determining the status of one whose primary business is not transportation is whether the disputed operations are "in bona fide furtherance of the primary business" or whether they "are conducted as related or secondary enterprises with the purpose of profiting from the transportation performed" (R. 26). Noting that "the Shannons admit that their principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio, and that in order to make a profit on

<sup>1</sup>The Commission's order was entered by Division 1 of the Commission. The full Commission denied a petition for reconsideration on April 5, 1960 (R. 38). The report and orders in this case were consolidated with those in Docket No. MC-C-1994, *Frerking Brokerage Co. Inc., Investigation of Operations*.

the backhaul of sugar they would have to have something moving to Louisiana from San Antonio" (R. 29), the Commission said (R. 29-30):

We are satisfied that the purpose of their buying and selling sugar and the transportation thereof from Supreme to certain points in Texas is to reduce the cost of transporting other commodities outbound from San Antonio. Such reduction of the cost of transportation of the other commodities constitutes a profit from the transportation of sugar from Supreme to the Texas points, and we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such \* \* \*. Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required \* \* \*.

3. On appellees' complaint, the three-judge district court enjoined the Commission from enforcing its order. The court held that there was no substantial evidentiary support for the Commission's ultimate finding that the appellees were engaged in the for-hire transportation of sugar (R. 167). It concluded, rather, that appellees were engaged in a "general mercantile business buying and selling many items, including sugar" (R. 167).



The district court, in its summation of the evidence (R. 166-167), noted that sugar was only one of a number of commodities which the appellees bought and sold; that normally they purchased sugar without having received orders therefor; that a relatively small portion of the appellees' assets and weekly payroll were devoted to their transportation activities; that the appellees took title to the sugar and incurred the incidental risks of loss or damage in transit or of price fluctuations; that they sold the sugar on credit and had sizeable accounts receivable outstanding; that they maintained a "reasonable" inventory of sugar; that they assessed no identifiable transportation charge; and that they did not hold themselves out to the general public to haul sugar for compensation.

The court did not refer to Section 203(e) of the Act. Nor did it note that appellees normally transported sugar only to fill an empty truck on a backhaul; that they could not otherwise have bought and sold sugar profitably; or the other circumstances upon which the Commission based its determination that appellees' backhaul transportation of sugar was not within the scope and in furtherance of a primary business enterprise other than transportation.

#### **SUMMARY OF ARGUMENT**

The basic question in this case is whether appellees are in the *merchandising* business or the *transportation* business in their handling of sugar. If the former characterization is accurate, then the hauling of sugar in their own trucks, incidental to their dealings in the commodity, is lawful private carriage. Otherwise,



the transportation, conducted without authority from the Commission, is prohibited by the Interstate Commerce Act.

The underlying facts are not disputed. Accordingly, resolution of the issue depends on a proper construction and application of the relevant statutory provision, Section 203(c) of the Act.

A. We begin by tracing the history of the 1958 amendment to Section 203(c), which now explicitly bars all private carriage of goods for business purposes "unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of the carrier. We show that, from an early date, the Commission has been concerned with attempts to abuse the statutory exemption in favor of private carriage, and that, recently, one of the devices which the Commission has sought to control is the arrangement under which a business enterprise, faced with an empty "backhaul," buys and transports, for immediate resale, a commodity which is unrelated to a primary non-transportation activity. Turning to the immediate legislative history of the 1958 amendment, we demonstrate that Congress expressly adopted the administrative view that such unlicensed operations should not be condoned under the cover of lawful "private carriage."

B. Next, we examine the facts of record to determine whether appellees' sugar hauling operations meet the statutory standard for incidental private carriage. At the outset, we note that the dealings in sugar are discrete from appellees' other business activities in livestock and feed grain. Most signifi-

cantly, we note that sugar is transported only in the firm's own trucks, almost invariably on what would otherwise be an empty backhaul; that the profit on the transaction is insufficient to bear the cost of dispatching empty trucks for the commodity; and that the firm maintains no substantial inventory of sugar, usually arranging a sale within a day or two of receipt and delivering the truckload directly to the buyer. On these facts, we conclude that appellees' sugar dealings amount to a transportation service, undertaken to mitigate the expense of hauling other goods, and are not a part of the firm's merchandising activities.

C. Finally, we examine the ruling below. Noting that the court failed even to cite the only applicable provision of the Interstate Commerce Act, Section 203(c), we show that its error lay in ignoring the facts relevant under the statutory standard.

#### ARGUMENT

APPELLEES' TRANSPORTATION OF SUGAR WAS NOT LAWFUL PRIVATE CARRIAGE UNDER SECTION 203(c) OF THE INTERSTATE COMMERCE ACT AND, THEREFORE, COULD NOT BE CONDUCTED WITHOUT AUTHORITY FROM THE COMMISSION

One of the continuing problems in administration of the Motor Carrier Act of 1935 has been that of defining the scope of private carriage, which is exempt from economic regulation under the Act and may be undertaken without Commission authority.<sup>4</sup> The

<sup>4</sup> Private carriage is subject only to safety regulation. Section 204(a)(3), 49 U.S.C. 304(a)(3). *United States v. American Trucking Ass'ns*, 310 U.S. 534, 550.

Commission "has had to decide whether a particular arrangement gives rise to that 'for-hire' carriage which is subject to economic regulation in the public interest, or whether it is, in fact, private carriage as to which Congress determined that the shipper's interest in carrying his own goods should prevail". *United States v. Drum*, 368 U.S. 370, 374 (1962). For a variety of reasons, many businesses prefer to transport their own goods in their own trucks, and the Act does not interfere with that practice. But, quite naturally, the existence of this area free of the regulatory controls applicable to for-hire carriage creates a strong incentive for others to render commercial transportation services under the guise of exempt private carriage. It has been attempted by such techniques as the sham leasing of vehicles (involved in *Drum*) and "buy-sell" transactions arranged so that the carrier owns the goods during transit, although in effect he is rendering transportation services. This case involves a special type of buy-sell arrangement, made to obtain a backhaul, i.e., to fill trucks which would otherwise return empty after a lawful outbound trip.<sup>5</sup> The danger is that this diversion of commercial carriage from the regulated motor carriers may impair their capacity to provide efficient service

<sup>5</sup> Buy-sell operations are described in a study by the Commission's Bureau of Transport Economics and Statistics, *Gray Area of Transportation Operations* (June 1960), p. 7. The backhaul buy-sell transactions specifically here at issue are described *id.* at pp. 11-12. See also O'Brien, *Twenty-Five Years of Federal Motor Carrier Licensing—The Private Versus For-Hire Carrier Problem*, 35 N.Y.U. L. Rev. 1150, 1156.

at reasonable rates to the bulk of shippers using, and dependent upon, regulated for-hire transportation.

Congress and the Commission have sought to meet this problem of distinguishing lawful private carriage by the development and articulation of the "primary business" test, now set forth in Section 203(c) of the Act. We shall discuss the meaning and purpose of the statutory criterion as applied to backhaul buy-sell arrangements (Point A); demonstrate that the Commission correctly applied it in this case (Point B); and argue that the district court misconceived the statutory test and erred in reversing the Commission (Point C).

A. THE 1958 AMENDMENT TO THE ACT WAS DESIGNED TO MAKE CLEAR THAT THE EXEMPTION OF PRIVATE CARRIAGE FROM REGULATION DID NOT COVER TRANSPORTATION OF GOODS BOUGHT BY A TRUCK OPERATOR FOR RESALE, WHERE THE VOLUME OF GOODS TRANSPORTED AND THE METHOD OF SALE AND DELIVERY ARE DETERMINED BY THE AVAILABLE BACKHAUL CAPACITY

The Original Motor Carrier Act defined a "private carrier of property by motor vehicle" as a person, not a "common" or "contract" carrier,\* who transports property of which he "is the owner, lessee or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise." Section 203(a)(17), 49 U.S.C. 303(a)(17), App., *infra*, p. 36. The Commission early took note of the inadequacy of this definition in that the exemption afforded private carriage might be abused through buy-sell arrangements. In

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\* The terms "common carrier by motor vehicle" and "contract carrier by motor vehicle" are defined in Section 203(a) (14) and (15), respectively, App., *infra*, p. 35.

numerous cases it warned that the truck operator's ownership of the goods being transported "alone is not sufficient to make this transportation that of a 'private carrier \* \* \*.'" *McBroom Contract Carrier Application*, 1 M.C.C. 425, 427 (1937).<sup>7</sup> In *McBroom*, the Commission granted a certificate authorizing the contract carriage of cheese, but, with respect to the carrier's practice of transporting on the return trip goods which it had purchased for resale at the end of the journey, the Commission noted that "the evidence available strongly suggests that this back-haul transportation is in reality for compensation as a common carrier" (*id.* at 427). From this beginning, the commission gradually developed, as the controlling standard in this area, the so-called "primary business" test.

The leading decision of the entire Commission enunciating this test is *Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. 65 (1949), affirmed *sub nom. Brooks Transportation Co. v. United States*, 93 F. Supp. 517, 522 (E.D. Va., 1950), affirmed, 340 U.S. 925. Two chair manufacturers transported their prod-

<sup>7</sup> See also *Carpenter Common Carrier Application*, 2 M.C.C. 85, 86 (1937); *D. L. Wartena, Inc., Common Carrier Application*, 4 M.C.C. 619, 623 (1938); *Johnson Common Carrier Application*, 10 M.C.C. 4, 5 (1938), and cases cited *infra*, p. 15, fn. 12.

<sup>8</sup> It soon became clear that the question could not be resolved simply by looking to the compensation paid the carrier. See *Woitishek Common Carrier Application*, 42 M.C.C. 193, 204-206 (1943); *Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. 65, 73-75, affirmed *sub. nom. Brooks Transportation Co. v. United States*, 93 F. Supp. 517, 522 (E.D. Va.), affirmed, 340 U.S. 925.



ucts in their own trucks; whenever possible, they also used the vehicles on the return movement to haul manufacturing materials for use and processing in their own plants. The Commission concluded (51 M.C.C. at 76) that the delivery of goods, and the backhaul, were lawful private carriage because undertaken "as a bona fide incident to and in furtherance of their primary businesses". And the governing rule was stated as follows (*id.* at 75):

If the facts establish that the primary business of an operator is the supplying of transportation for compensation, then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale \* \* \*. If, on the other hand, the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. In our opinion, they cannot be both. A finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that the motor operations are conducted in bona fide furtherance of its other and primary commercial enterprise.

In many cases the critical issue to be resolved, in applying the "primary business" test, is whether the operator of the vehicles has any non-transportation



enterprise whatever; either his only operation is the transaction being evaluated, or his other services are concededly for-hire transportation.<sup>9</sup> In other cases, the operator clearly has a primary industrial or mercantile enterprise and the question is whether specific transportation operations "are within the scope, and in furtherance of" such primary business.<sup>10</sup>

<sup>9</sup> E.g., *Scott v. Interstate Commerce Commission*, 213 F. 2d 300 (C.A. 10, 1954); *A. W. Stickle & Co. v. Interstate Commerce Commission*, 128 F. 2d 155, 159 (C.A. 10, 1942), certiorari denied, 317 U.S. 650 (1942); *Interstate Commerce Commission v. Asphalt Supply Co.*, 152 F. Supp. 559, 561 (N.D. Tex., 1957); *Mumby Investigation of Operations*, 82 M.C.C. 237, 249 (1960); *Subler Transfer, Inc. Investigation of Permits*, 79 M.C.C. 561 (1959); See also cases in fn 12, p. 15, *infra*.

The Commission position that there was no non-transportation business was rejected in *Taylor v. Interstate Commerce Commission*, 209 F. 2d 353 (C.A. 9, 1953), certiorari denied, 347 U.S. 952 (1954); *Interstate Commerce Commission v. Woodall Food Prod. Co.*, 207 F. 2d 517 (C.A. 5, 1953); *Interstate Commerce Commission v. Clayton*, 127 F. 2d 967 (C.A. 10, 1942).

<sup>10</sup> E.g., *Interstate Commerce Commission v. Jamestown Sterling Corp.*, 64 F. Supp. 121 (W.D.N.Y., 1945); *Wallace Investigation of Operations*, 89 M.C.C. 593 (1962); *Burlington Mills Corp., Transp. for Compensation*, 53 M.C.C. 327 (1951); *Watson Mfg. Co., Inc., Common Carrier Application*, 51 M.C.C. 223 (1949); *Woitishek Common Carrier Application*, 42 M.C.C. 193 (1943); see backhaul cases discussed *infra*, pp. 25-29. The leading *Woitishek* decision stressed that a person primarily engaged in manufacturing, merchandising or some other non-carrier enterprise may still be held to be "a carrier for hire" as to a particular transportation activity "which he performs . . . not primarily in furtherance of his noncarrier interest but rather . . . with a purpose to profit from the transportation as such." 42 M.C.C. at 206.

The Commission position that certain operations were not incidental to an existing non-transportation business was rejected in *Interstate Commerce Commission v. Tank Car Oil Corp.*, 151 F. 2d 834 (C.A. 5, 1945).

Notwithstanding this Court's affirmation of the "primary business" test in *Brooks Transportation*, subsequent decisions by lower courts raised doubts whether a truck operator could be found to be a for-hire carrier operating without Commission authorization in the absence of some affirmative showing that his operations brought him within the definitions of common or contract carriage.<sup>11</sup> The Commission accordingly sought legislation to deal with the increasing use of buy-sell arrangements. In doing so, it explicitly brought to the attention of Congress the special class of buy-sell operations involving the use of backhaul capacity, previously noted in the early *McBroom* case and other decisions,<sup>12</sup> and involved in the instant case. In this situation, an oper-

<sup>11</sup> In *Taylor v. Interstate Commerce Commission*, 209 F. 2d 353 (C.A. 9, 1953), certiorari denied, 347 U.S. 952 (1954) and *Interstate Commerce Commission v. Woodall Food Prod. Co.*, 207 F. 2d 517 (C.A. 5, 1953), the courts rejected the Commission's position that the operators were not in lawful private carriage, largely on the grounds that there was no express or implied contract for transportation services (*Taylor*), and no holding out as a carrier for hire (*Woodall*). These decisions, although not expressly rejecting the primary business test, in effect, undermined it. *Taylor* was specifically discussed in the Commission's Sixty-Eighth Annual Report (1954), p. 82.

<sup>12</sup> *McBroom Contract Carrier Application*, 1 M.C.C. at 427, described *supra*, p. 12; *Triangle Motor Co. Contract Carrier Application*, 2 M.C.C. 485, 489 (1937); *Farnsworth Contract Carrier Application*, 4 M.C.C. 164, 165-166 (1938); *Redding Common Carrier Application*, 7 M.C.C. 608, 610-611 (1938); *Siler Common Carrier Application*, 9 M.C.C. 719, 720 (1938); *Edward Pearsall Co. Contract Carrier Application*, 11 M.C.C. 646, 647 (1938). In these cases, the operator's lawful movement was in common or contract carriage, to which was sought to be appended a backhaul of commodities purchased for resale.

ator who has undertaken an authorized one-way truck movement—either in for-hire or private carriage—hauls, on the reciprocal or return leg of the movement, goods which he has bought for his own account and which he resells, usually for immediate delivery on arrival. This “buy-sell” transaction is stimulated by the presence of available backhaul capacity and the desire to spread the costs of the round trip necessitated by the outbound movement. If, instead of returning empty, the operator can backhaul goods and recoup more than their purchase price, he can apply the excess to help defray the transportation costs of, or add to the profit from, a movement already undertaken for other business reasons.”

Beginning in its annual report for 1953, and each year thereafter until the enactment and amendment of Section 203(c), the Commission described the increasing resort to buy-sell operations and the resulting adverse effects upon regulated carriage. It particularly stressed the practice whereby manufacturing and commercial firms using private carriage purchase goods for transportation on the backhaul and resell them. “Such transportation” the Commission advised Congress “is performed for the purpose of receiving compensation for the otherwise empty return of their trucks”. Sixty-Seventh Annual Report (1953), p. 55; see also Sixty-Eighth Annual Report (1954), p. 5; Sixty-Ninth Annual Report (1955), p. 99; Seventieth Annual Report (1956), p. 161; Seventy-First Annual

<sup>13</sup> See *Church Point Wholesale Beverage Co., v. United States*, 200 F. Supp. 508 (W. D. La., 1961); Taff, *Commercial Motor Transportation* (3d ed. 1961), pp. 221-222.

Report (1957), p. 137.<sup>14</sup> In the last two cited reports, the Commission recommended the passage of legislation<sup>15</sup> and the result was the amended Section 203(c) applied by the Commission in this case.

<sup>14</sup> Thus, in its Sixty-Seventh Annual Report (1953), the Commission said (p. 55):

Merchandising by motortruck, whether actual or pretended, over long distances is increasing to such an extent that it is becoming a major factor in the transportation of freight between distant points. Manufacturers and mercantile establishments, which deliver in their own trucks articles which they manufacture or sell, are increasingly purchasing merchandise at or near their point of delivery and transporting such articles to their own terminal for sale to others. Such transportation is performed for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other cases, arrangements are made with the consignee of such merchandise for the "buy-and-sell" arrangement in order that the consignee may receive transportation at a reduced cost.

<sup>15</sup> Hearings on S. 1384, etc., Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., pp. 25-26 (1957); Hearings on Problems of the Railroads before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 1832 (1958); Hearings on Railroad Problems before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 109 (1958).

The original legislative proposal of the Commission was to amend the definition of "private carrier" in Section 203(a) (17), see S. 1677, H.R. 5825, 85th Cong., 1st Sess. In the Seventy-First Annual Report (1957), p. 138; the Commission stated that its "objective" would be "accomplished just as readily" by a proposal of the Transportation Association of America, which would write the primary business test into the Act. The congressional committee reports show that, by doing so in Section 203(c), Congress was accepting the Commission's approach towards buy-sell arrangements and backhaul operations.

The first step was the enactment of original Section 203(c) which, as added to the Act in 1957, expressly prohibited engaging in "for hire transportation" without Commission authorization.<sup>18</sup> The committee report on this provision stated that such a prohibition was necessary to prevent the creation of a "no man's land" between regulated and private carriage, in which unregulated "for hire" operations might be conducted on the theory that they did not constitute common carriage, "because not held out to the general public, or for other reasons" and did not meet the definition of contract carriage. H. Rep. 970, 85th Cong., 1st Sess., p. 4; see also S. Rep. 703, 85th Cong., 1st Sess., pp. 6, 7-8; Interstate Commerce Commission, Seventieth Annual Report (1956), pp. 161-162.

The following year, at the Commission's urging, Congress took the next step and dealt explicitly with the line between "for hire" and private transportation. In the Transportation Act of 1958, 72 Stat. 574, the new Section 203(c) was amended to add the following prohibition:

nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for

<sup>18</sup> Section 203(c), as amended by Section 2 of Public Law 85-163, 71 Stat. 411, provided as follows:

Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation. \* \* \*



business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Congress thereby sought to eliminate the specific practices brought to its attention by the Commission, which it regarded as "pseudo-private carriage," characterized by "subterfuges" to evade economic regulation and avoid imposition of the transportation excise taxes. S. Rep. No. 1647, 85th Cong., 2d Sess., pp. 5, 23; H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 17-18. The Senate Committee (at p. 24), after noting its concern over the erosion of traffic of regulated carriers, explained that one common technique was the "so-called buy-and-sell method," in which papers are prepared "to make it appear" that the commodities belong to the owner of the vehicle; and that another increasingly used subterfuge was "the backhaul method of operation" involved in this case. By this means—

"\* \* \* concerns that deliver in their own trucks articles which they manufacture or sell \* \* \* then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or \* \* \* they transport property they do not own, such transportation being performed only for the purpose of receiving compensation for the otherwise empty return of their trucks."

<sup>17</sup> Similarly, the House report (H. Rep. 1922, 85th Cong., 2d Sess., pp. 17-18) identified two types of "pseudo-private carriage" which it sought to prohibit as being "a subterfuge for engaging in public transportation without complying with



As the Senate Committee explained, both of these methods of commercial transportation—backhaul buy-sell operations auxiliary to lawful private carriage as well as spurious buy-sell arrangements—should be subject to economic regulation (S. Rep. No. 1647 at pp. 24-25):

With the Interstate Commerce Act amended in this way commercial highway transportation of property in interstate or foreign commerce would, with certain specific exemptions, be required to fall into one or another of three classes: (a) duly certificated common carriage, (b) duly permitted contract carriage or (c) transportation solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter. Other commercial highway transportation, except as specifically provided, would be prohibited. This, it is believed, would serve to correct most of the abuses that have arisen in the name of private carriage and yet would not in any

the certificate or permit requirements of the Interstate Commerce Act." The first was the fictitious buy-sell arrangement. The second was the backhaul buy-sell here involved, described as follows (*id.* at 18):

In addition, businesses which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost.

See also 104 Cong. Rec. 10818; 104 Cong. Rec. 12535.

way jeopardize or interfere with what might be called legitimate or bona fide private carriage. Indeed the "primary business test" contained in *Brooks Transportation Co. v U.S.* (340 U.S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute.

Thus, the express purpose of this legislation was twofold: *first*, to confirm the Commission's "primary business" test, making clear that transportation operations cannot qualify as exempt private carriage unless they are performed by someone primarily engaged in a non-transportation business and are within the scope and in furtherance of that primary business; *second*, and more directly in point here, to make plain that the purchase and sale of goods solely to take advantage of available backhaul capacity cannot qualify as a "primary business enterprise (other than transportation)" and that the transportation of such goods is not lawful private carriage.

Read against this background, we believe that there is no ambiguity in the statute and no doubt of its applicability to this case. But even if the sense of the law were less clear, plainly this is the kind of case which "belongs to the usual administrative routine" of the agency (*Gray v. Powell*, 314 U.S. 402, 411) and the Commission's application of the statutory test to the specific facts of this case "is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Labor Board v. Hearst Publications*, 322 U.S. 111, 131.

B. THE COMMISSION PROPERLY HELD THAT APPELLEE'S TRANSPORTATION OF SUGAR, PERFORMED AS PART OF SUCH A BUY-SELL OPERATION BASED UPON AN AVAILABLE BACKHAUL, WAS "FOR HIRE" TRANSPORTATION UNDER SECTION 203 (C).

In appraising the lawfulness of asserted private carriage under Section 203(c), the Commission has consistently sought to apply the criteria of the Act in effectuation of the congressional purpose which we have described. In this and other cases, the dispositive question has been whether the buy-sell operations were dictated by the availability of backhaul movements of the carrier's trucks. The Commission's finding here that this was the basis of appellee's sugar business is supported by compelling evidence. Its conclusion that appellee was not engaged in lawful private carriage of sugar represents a consistent and correct administrative interpretation of the governing statute.<sup>18</sup>

1. As the Commission stated, appellees have admitted that "their principal reason for purchasing sugar at Supreme is to provide a backhaul \* \* \* and that in order to make a profit on the backhaul of sugar they would have to have something moving to Louisiana from San Antonio" (R. 29). Mr. Richard J. Shannon testified that the appellees normally purchased sugar only to make a return load for their vehicles to San Antonio, after having made deliveries

<sup>18</sup> The enactment of Section 203(c) and its amendment in 1958 occurred between the time that the examiner submitted his report and recommended order on August 29, 1957, and the time the Commission, Division 1, served its report on August 11, 1959. The Commission was obligated to consider the matter under the provisions of the Act as amended. *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78.

of outbound shipments of livestock or other merchandise at or near Supreme (R. 112-113, 132); and that they could not profitably deal in sugar at the prevailing market price at San Antonio but for the availability of the vehicles which they otherwise would have to return without lading (R. 112). The Commission had ample ground to conclude that "the purpose of [appellees'] sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks which are moving in the opposite direction"; and that this purchase-and-sale and transportation was undertaken "to reduce the cost of transporting other commodities outbound from San Antonio" (R. 29).

The result, that appellees' sugar dealings was not a primary nontransportation business under Section 203(●), is strongly buttressed by other facts noted by the Commission. Appellees ordinarily sell the sugar while it is en route or upon arrival (R. 24, 29, 68, 117-118) and deliver the sugar by routing the trucks from the refinery directly to the customer at San Antonio (R. 23, 68; Ex. 1, R. 117-118).<sup>19</sup> Moreover, unlike their operations in livestock, feed and related items, appellees never use common or contract carriage in their sugar dealings; the only sugar which

<sup>19</sup> Appellees contend that sugar must be disposed of rapidly because of its perishable nature (Motion to Affirm, p. 4). It is clear, however, that sugar can be warehoused for substantial periods if proper equipment is installed to control temperature and humidity. Spencer & Meade, *Cane Sugar Handbook* (8th ed. 1945), pp. 242-244. The absence of such equipment is further evidence that appellees' sugar dealings were not a bona fide primary business.

they bought and sold was transported in their own vehicles (R. 23, 115). Thus, while they claim to be in a general mercantile business, appellees themselves clearly distinguish their sugar operations from their principal trade in livestock, feed and related items.<sup>20</sup> In sum, their dealings in sugar are determined and limited by the times and place at which their empty trucks are available for a backhaul.

2. The facts of this case, in short, fit Congress' description of the operations it meant to exclude from exempt status by the 1958 amendment to Section 203(c). Appellees, "deliver in their own trucks articles which they manufacture or sell and then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others". S. Rep. 1647, 85th Cong., 2d Sess., p. 24. (1958). Such transportation was "performed only for the purpose of receiving compensation for the otherwise empty return of their trucks" (*ibid.*).

Moreover, the Commission's decision here is consistent with the uniform application of Section 203(c) to backhaul buy-sell operations. No sound distinction can be drawn between the instant decision and a

<sup>20</sup> In their Motion to Affirm, p. 3, appellees characterize their business as extending to "everything in the feed line." The record indicates that their principal *sugar* customers include a wholesale grocer, a candy company, a bottler and a dairy (R. 66-67, 70, 83; Ex. 1, R. 118). While the Commission did not have occasion to rely upon this fact, it seems clear that appellees' sugar customers are quite distinct from the remainder of their trade. This confirms that the sugar sales were not a natural extension of appellees' primary business, but were dictated by their backhaul capacity.



line of recent Commission cases under 203(c) following *Shannon*, two of which have been approved by three-judge district courts.<sup>21</sup>

In each of these cases, the companies were admittedly engaged in a primary non-transportation enterprise, in connection with which they performed lawful private carriage. On the disputed backhaul, each company carried goods which it bought at or near the terminus of the lawful private haul, and which it resold at or near the point of origin to which the vehicles returned.<sup>22</sup> The common pattern also in-

<sup>21</sup> *Church Point Wholesale Beverage Co.—Investigation of Operations*, 82 M.C.C. 456 (1960), affirmed, *Church Point Wholesale Beverage Co. v. United States*, 200 F. Supp. 508 (W.D. La., 1961); *Wilson—Investigation of Operations*, 82 M.C.C. 651 (1960); *Hofer—Investigation of Operations*, 84 M.C.C. 527 (1961); *Cahaba Steel Co.—Investigation of Operations*, 86 M.C.C. 759 (1961), affirmed *Cahaba Steel Co. v. United States*, S.D. Ala., Civil Action No. 2669, decided January 17, 1962 (unreported); *Meinerz Creamery Co.—Investigation of Operations*, 88 M.C.C. 77 (1961); *Stewart—Investigation of Operations*, 89 M.C.C. 281 (1962).

<sup>22</sup> In *Stewart* and *Church Point*, the lawful private carriage was inbound, consisting of the transportation of goods to the respective business establishments. The disputed reciprocal movement was actually a "fronthaul"; the companies transported goods purchased near their places of business for resale near the places to which empty trucks would otherwise have gone to pick up merchandise. For purposes of Section 203(c), this is the same as a backhaul and we will not distinguish between them. In *Hofer*, the Commission expressed doubt that the operator had any lawful primary business, but then discussed the backhaul on the *arguendo* assumption that the outbound movement was lawful.

Unlike the cases in the text, in which the backhaul was reciprocal to a lawful private movement, one recent case involved a disputed backhaul when the outbound movement was in lawful



cluded deliveries to customers directly on the trucks which executed the backhaul;<sup>23</sup> the consistent failure to use common or contract carriage to carry the goods whose transportation was in question;<sup>24</sup> and a profit dependent on the use of backhaul capacity.<sup>25</sup> Also revealing is the fact that in all but one of the above cases, the backhauled commodity was sugar bought at an accessible refinery; in *Cahaba*, it was salt. Such fungible commodities as sugar lend themselves to this method of operation, since they are easily disposed of by the truck operator.<sup>26</sup>

In each of the cited cases, as here, the Commission ruled that the operations were not lawful private carriage. The relationship of the disputed carriage for-hire carriage, like the early cases cited *supra*, p. 15, fn. 12. *Subler Transfer, Inc.—Investigation of Permits*, 79 M.C.C. 561 (1959).

<sup>23</sup> See, e.g., *Stewart*, 89 M.C.C. at 286; *Meinerz*, 88 M.C.C. at 79-80, 85; *Hofer*, 84 M.C.C. at 537-539; *Wilson*, 82 M.C.C. at 656; *Church Point Wholesale Beverage Co.*, 82 M.C.C. at 459-460.

<sup>24</sup> See, e.g., *Stewart*, 89 M.C.C. at 288; *Meinerz*, 88 M.C.C. at 84; compare *Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. at 66, 67; *Woitishck Common Carrier Application*, 42 M.C.C. at 206.

<sup>25</sup> See, e.g., *Stewart*, 89 M.C.C. at 288; *Meinerz*, 88 M.C.C. at 84; *Cahaba Steel Co.*, 86 M.C.C. at 765; *Hofer*, 84 M.C.C. at 540.

<sup>26</sup> In a case involving buy-sell arrangements on the direct haul of sugar and flour (not a backhaul), the Commission found that the operations were not lawful private carriage under Section 203(c) and noted the "increasing number of cases of this type coming before us, and the frequency with which the commodity involved in such cases is sugar or another fungible such as flour". *Mumby Investigation of Operations*, 82 M.C.C. 237, 249 (1960).

to available backhaul capacity was critical to these determinations. Thus, as stated in *Stewart*, 89 M.C.C. at 288, the backhauling, "coordination of movements inevitably leads to the conclusion that the considered sugar operations are performed solely for the purpose of achieving a profit-yielding two-way movement, and eliminating the cost of dispatching an empty vehicle to a supplier to pick up other merchandise for use in bona fide wholesale and retail operations." The point was also developed in *Meinerz*, 88 M.C.C. at 84, which explained that the company "does not transport sugar from the refineries except as a backhaul, and by the fact that it would not be in the sugar business at all except for the fact that it can backhaul this commodity. \* \* \* its transportation of dairy products by reducing the cost thereof and thus falls within the prohibition of section 203(c) of the act."

As noted, in two of these cases closely resembling this one, three-judge district courts have affirmed the Commission's judgment. In *Church Point Wholesale Beverage Co. v. United States*, 200 F. Supp. 508 (W.D. La., 1961), the court relied upon the "clear" language of Section 203(c), and its "unmistakable" purpose, to hold that the backhaul of sugar did not meet the primary business test (200 F. Supp. at 516-517):

The only relationship between the movement of sugar and plaintiffs' primary business of wholesaling is that the sums realized from the movement of the sugar serve to reduce the cost of conducting plaintiffs' other transportation activities. \* \* \*

While the northbound transportation of sugar reduces the allocation of round-trip costs assignable to the merchandise picked up for wholesale distribution in Louisiana, this economic benefit accruing to the non-carrier business enterprise of the plaintiffs is too remote to place such transportation within the regulatory exemption afforded private carriage by the Act. But for the mechanics of assuming title to the sugar they transport, there would be no question that the plaintiffs are engaged in for-hire carriage in their northbound transportation.

And the court pointed to the impact of a contrary result (*ibid.*):

Plaintiff's justification of their northbound transportation would make a nullity of the primary business test expounded by the Commission, sustained by the courts and ratified by the Congress in the enactment of Section 203(c) of the Act, for it would permit any person engaged in any other business enterprise to transport property by motor vehicle, irrespective of whether such transportation is, in fact, within the scope or in furtherance of such person's primary business enterprise, if the performance of the transportation makes possible more profitable utilization of the equipment used in the primary business enterprise.

In *Cahaba Steel Co. v. United States*, S.D. Ala., Civil Action No. 2669, decided January 17, 1962, the court, in a brief *per curiam* order, affirmed the Commission's ruling (*Cahaba Steel Co.—Investigation of Operations*, 86 M.C.C. 759, 764-765) that a steel wholesaler was engaged in for-hire transporta-

tion by conducting a backhaul operation in salt "to avoid an empty return haul" after delivery of his goods in trucks; the conclusion was that the evidence "show[ed] an intention to profit from the return transportation as such" and that the company was "engaging in for-hire transportation subject to the certificate or permit requirements of the Act."

This consistent interpretation of the Act, in harmony with the legislative purpose, strongly supports the result reached by the Commission in this case. We submit that the Commission correctly applied Section 203(c) in the premises. Since appellees were engaged in unauthorized for-hire transportation of sugar, the Commission's cease-and-desist order should have been sustained.<sup>27</sup>

<sup>27</sup> Appellees have contended (Motion to Affirm, pp. 20-22), that the Commission's order was erroneous because it stated that the sugar transportation was "in violation of section 206(a) or 209(a) of the Interstate Commerce Act" (R. 30), without identifying which was violated. These sections authorize issuance of certificates to common and contract carriers respectively. It was sufficient for the Commission to note that appellees lacked any authorization under either section, after deciding that they were beyond the scope of private carriage, and it was not necessary for the Commission to decide whether appellees could be classed as common or contract carriers. In many cases, the courts have enjoined unauthorized for-hire motor carrier operations without finding whether the defendant would otherwise be a common or contract carrier. *Vincze v. Interstate Commerce Commission*, 267 F. 2d 577 (C.A. 9, 1959); *Lamb v. Interstate Commerce Commission*, 259 F. 2d 358 (C.A. 10, 1958); *Georgia Truck System v. Interstate Commerce Commission*, 123 F. 2d 210, 212 (C.A. 5, 1941); *Interstate Commerce Commission v. Isner*, 92 F. Supp. 582 (E.D. Mich., 1950); *Interstate Commerce Commission v. F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn., 1948).

C. THE DISTRICT COURT ERRED BY FAILING TO APPLY THE STANDARDS  
OF SECTION 203(C)

The notable feature of the decision of the district court is that it reversed the Commission, and held that appellees were engaged in lawful private carriage, without once citing the governing statute, Section 203(c). As a result, the court below failed to evaluate, or even note, those facts in the record which are critical to application of the Act's primary business test in a backhaul situation. The standard implicitly adopted is plainly incorrect.

1. As we have explained, application of the statutory test to this situation requires a determination whether the appellees' transportation of sugar was a buy-sell operation tied to backhaul movements of its trucks. The court below purported to set out the "relatively uncomplicated" "basic facts in this proceeding" (R. 166). But it nowhere mentions that appellees normally bought and transported sugar for resale only to fill otherwise empty trucks on a backhaul; that they could not have dealt profitably in sugar without the available backhaul; that they usually delivered sugar directly to San Antonio customers; and that they never used for-hire transportation in their sugar operations. These facts were crucial to the Commission's determination under the "primary business" criterion.

The issue here cannot be answered by resort to legal rules developed for other purposes (like fixing the risk of loss), any more than by calling upon a layman's understanding of what is private carriage or what is a non-transportation enterprise. Congress



determined that transportation operations as part of backhaul buy-sell dealings—although private in the sense that the trucker owned the goods—should be excluded from the statutory concept of lawful private carriage. To achieve this, Congress adopted as its test whether the carriage is “within the scope, and in furtherance, of a primary business enterprise (other than transportation)”.

The theory of the statute is that trading tied to a backhaul serves to reduce the cost of the lawful one-way haul already undertaken and is, in effect, a by-product of transportation facilities, not a part of the primary business activities of the enterprise. It is the statutory standard, construed in the light of this congressional purpose, which is controlling.

2. The court's statement of what it deemed the pertinent facts shows that it ignored this standard.

The court pointed out that only a relatively small portion of appellees' assets and weekly payroll were devoted to their transportation operations (R. 166). This would be pertinent to a determination whether the appellees were engaged in any primary business other than transportation. But it is undisputed that appellees' trading in livestock, feed and related items did constitute a primary non-transportation business. The question is whether appellees' buying and selling of sugar was also such a primary enterprise. This question must be answered in the light of the intent of Congress expressed in Section 203(c) to prevent the use of the “backhaul method of operation” as a means of escaping “economic regulation” (S. Rep. No. 1647, 85th Cong., 2d



Sess., pp. 23-24; H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 17-18). In that light, buy-sell dealings dictated by the availability of backhaul capacity cannot qualify as a primary non-transportation business.

Nor is the decision below supported by the other facts recited in the opinion (R. 166-167): that appellees' purchases of sugar were normally not against pre-existing orders; that they took title to the sugar and assumed the risks of loss or damage, or of price fluctuations incident thereto; that they sold the sugar on credit and had sizeable accounts receivable for sugar sales; that they assessed no identifiable transportation charge, and that they did not hold themselves out to haul sugar for compensation. These circumstances might have been pertinent if the *bona fides* of appellees' acquisition and disposition of the sugar were in issue. To be sure, in 1958 Congress sought to exclude from the class of lawful private carriage spurious buy-sell arrangements.<sup>23</sup> But it also made clear that "the backhaul method of operation" would not qualify for exemption.

In the case of "backhaul" transportation the ultimate question is whether the buy-sell operation is conducted because of and measured by the availability of backhaul capacity. Here, therefore, such facts as were noted by the district court are of distinctly subsidiary significance. That line of inquiry is of special relevance where the issue is whether the purchase and sale are a sham. But the *bona fides* of the commercial

<sup>23</sup> See *Woitishek Common Carrier Application*, 42 M.C.C. 193, 201-207 (1943); *Wilson—Investigation of Operations*, 82 M.C.C. 651, 655 (1960).

transaction cannot outweigh the congressional policy that buy-sell operations conducted because of the availability of a backhaul is not lawful private carriage.

Finally, the Commission's conclusion is unimpaired by the court's finding that appellee's business in livestock, feed and related items was "a general mercantile business." Apart from the absence of any record support for this characterization of appellees' trading in livestock, feed and related items, it is clear that the sugar dealings were discrete from the rest of their business. They were developed to generate a backhaul and were only carried out in appellees' trucks, to mention two salient distinctions. See also *supra*, pp. 22-24. The lower court's approach would permit any mercantile firm selling a reasonable range of goods to backhaul any other commodity without Commission authority. This would go a long way to "make a nullity of the primary business test," *Church Point Wholesale Beverage Co. v. United States*, 200 F. Supp. at 517. Effectuation of the legislative purpose required a separate appraisal of the backhauled commodity and its relation, if any, to a primary non-transportation business.<sup>29</sup> It was only by failing to follow that approach that the court was able to conclude that appellees were "in the sugar business." More careful analysis, we submit, would have shown that they entered the sugar *transportation* business.

<sup>29</sup> See the discussion of the operators' wholesale and retail mercantile business in *Stewart*, 89 M.C.C. at 287-288; *Church Point Wholesale Beverage Co.*, 82 M.C.C. at 460-461.

## CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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FEBRUARY 1964.

## APPENDIX

Section 203(a)(14) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(14), provides:

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(15), provides:

The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 203(a)(17) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(17), provides:

The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Section 203(c) of the Interstate Commerce Act, 49 U.S.C. § 303(c), provides:

Sec. 203(c) \* \* \* no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation,\* nor shall any person, engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Section 206(a) of the Interstate Commerce Act, 49 U.S.C. § 306(a), in part provides:

\* \* \* no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on

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\*Section 203(c) as added to the Act in 1957 ended at the point indicated by the above asterisk, 71 Stat. 411. The remainder of the section was added by amendment in 1958, 72 Stat. 574.

any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: \* \* \*

Section 209(a) of the Interstate Commerce Act, 49 U.S.C. § 309(a), provides in part:

\* \* \* no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission authorizing such person to engage in such business: \* \* \*



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Nos. 406 & 421

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1963

RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a  
E. and R. SHANNON, *Appellees*

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COMMERCE COMMISSION, ET AL., *Appellants*

v.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

**BRIEF FOR THE APPELLEES**

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IN THE  
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---

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E. and R. SHANNON, *Appellees*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

---

**BRIEF FOR THE APPELLEES**

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**STATUTES INVOLVED**

Statutes other than those referred to by the various appellants in their briefs which appellees believe have some materiality in this cause are set forth in the Appendix. These include Section 222 (a) of the Interstate Commerce Act, 49 U.S.C. Section



322 (a), *infra*, page 59, and Section 8 (b) of the Administrative Procedure Act, 60 Stat. 242 (5 U.S.C. Section 1007b), *infra*, page 59.

### QUESTION PRESENTED

Whether from the record as a whole the District Court was correct in holding that the findings and conclusions by the Interstate Commerce Commission that appellees are engaging in transportation in interstate commerce of sugar as a common or contract carrier by motor vehicle without appropriate authority in violation of Sections 206 (a) or 209 (a) of the Interstate Commerce Act was not supported by substantial evidence.

### STATEMENT

So as to distinguish between the various appellants herein, the United States of America and Interstate Commerce Commission will hereinafter be referred to as appellant, the various appellant carriers will be referred to as appellant carrier, the *amicus curiae* as such, and the appellees in the singular as appellee.

Appellee believes that the various statements of the case contained in the other briefs herein do not adequately present the true fact situation surrounding appellee's dealings in sugar; therefore appellee hereby sets out other facts contained in the record in this cause which are material to a correct solution to the problem before the Court. For purposes of clarity, appellee will restate certain of the facts already described in the various appellant's briefs.

In the first place the original hearing in this matter was ordered and developed as a result of a routine investigation and that about two years prior

to the original hearing in this matter appellee had received a communication from the Interstate Commerce Commission concerning his sugar business but no action was at that time taken against him. (R. 66, 71) Appellee is in the business of buying and selling livestock, in the feed mill business, and also sells corn, oats, wheat, bran, molasses, sugar, salt, fertilizers and everything in the feed line. Appellee has been in business since about 1934 and began handling grains, fertilizers, molasses and similar items about six years prior to the 1957 hearing before the examiner in this matter and sugar a little over three years prior to said hearing. (R. 74, 106, 107) Appellee had seven trucks valued at \$14,176.50 as of December 31, 1956, and of those, only three of them were used for long hauling which includes the hauling of sugar and many other items. That the total amount of fixed assets of the company, including mill equipment, office furniture, automobiles, etc. is \$59,350.26 as of December 31, 1956, and all of said asset accounts remained fairly constant during the year 1956 and up until the date of hearing. (R. 85, 87, 88, 90, 97) That in addition to the fixed asset accounts there were \$56,459.91 in current assets of which \$30,000.00 was in accounts receivable, leaving \$26,000.00 other assets, including approximately \$4,700.00 in cash, so that the three trucks being used to haul sugar represented in the total of seven trucks, the seven trucks being valued at \$14,176.50, was a small percentage of the total assets of the company; and further such trucks used for hauling sugar also hauled many other items. (R. 88, 89, 97, 98) The salaries paid truck drivers used on the large trucks averaged \$240.00 per week out of a total payroll of \$1100.00 per week and the three truck

drivers on the three large trucks were not paid exclusively for hauling sugar but hauled many other items. (R. 90, 91, 97, 98)

Appellee purchases sugar taking title in his own name and any losses on same after purchase is borne by appellee. (R. 71, 105, 108) When the word "consignee" is used on appellant's exhibit I (R. 118), appellant's own witness admits that such designation is used in error (R. 71, 72). It is not appellee's practice to take orders for sugar and then obtain same. (R. 110) Appellee attempts to sell the sugar as rapidly as possible because the market for sugar breaks rapidly, the margin of profit is comparatively small, and the commodity deteriorates quickly. (R. 72, 73, 104) The margin of profit in the sugar business for a sugar dealer in San Antonio, Texas, on the date of the hearing in March, 1957, was 25¢ to 35¢ per hundred pounds. (R. 103) Appellee could and had sent an empty truck from San Antonio to the place of purchase of the sugar at Supreme, Louisiana, to transport sugar back to San Antonio at a profit. (R. 112) Appellee stated that he could not make a profit on such transportation at the prices sugar was selling for in San Antonio at the time of the hearing since beet sugar from Colorado, California, and Canada was, at such time, keeping the sales price of sugar down in San Antonio. (R. 108)

The cost of unloading sugar and storing it is comparatively high and eats into or causes to vanish any profit that those in the sugar business might make, and the price fluctuation in the sugar business are also quite drastic, which necessitates the moving of

the item quickly to avoid possible loss. That although this would be true in any mercantile business some items are more perishable than others. (R. 68, 73) On occasion appellee will send an empty truck to Louisiana to load sugar, but as a matter of common sense it would be more profitable for him to be delivering some commodity that he was selling to Louisiana at the same time. (R. 67, 111) However, a considerable amount of sugar remains in the warehouse of appellee in San Antonio (over 50,000 pounds at the last inventory taken prior to the hearing, less that portion thereof which may have been in transit but still properly included in the inventory.) (R. 81, 93, 112) From this stored sugar frequent sales in less than carload lots are made. (R. 109, 110) Appellee has on occasion stored sugar in commercial warehouses when his warehouse facilities were inadequate, but such additional expense, of course, is avoided when appellee's warehouse facilities can handle the storage. (R. 77, 82)

There was no evidence to show that there were any identifiable transportation charges made by appellee to the purchasers of the sugar; nor has appellee any basis or formula for assessing transportation charges, but instead his sales are governed solely by the market price of sugar in San Antonio; nor does appellee hold himself out to the general public to haul sugar for any compensation. (R. 14, 15)

That prior to appellee's buying and selling of sugar he purchased and still does purchase salt and grain in the same manner as he now purchases and sells

sugar; however, the Interstate Commerce Commission never questioned the transportation of any of the items handled in the identical manner as sugar. (R. 23, 113)

Appellee sells almost all of his sugar to purchasers on credit and has been selling on credit since the inception of his sugar business. On the date of the hearing appellee had more than \$10,000.00 tied up in accounts receivable from purchasers of sugar and at times during 1956 (the year immediately prior to the hearing) had as much as \$20,000.00 to \$30,000.00 tied up in accounts receivable from sugar purchasers. (R. 82, 83, 84, 85) Of course, what is considered a large inventory varies depending on the business and a large inventory in the sugar business would be considerably less than would an inventory of more stable products, where the market does not fluctuate, nor the item deteriorate as rapidly. (R. 68, 73, 104)

#### SUMMARY OF ARGUMENT

The basic question is whether the district court was correct in holding that appellee was a bona fide merchant in his handling of sugar.

First appellee discusses the fact that the district court applied the correct standard under the substantial evidence rule to determine the validity of the opinion of the Interstate Commerce Commission. The examiner's report which recommended in favor of appellee is next discussed together with authorities to the effect that such report has some affirmative worth in this matter.



The "primary business" test prior to 1958 is considered with a showing that under the case law a fact situation such as the case at bar, where appellee has the incidents of private carriage as a sugar merchant, should be held to be such private carriage. It is then pointed out that the Congressional Amendment of 1958 merely codified the case law until that time, so that said amendment should not change the result of private carriage in this case. The facts of the case are then discussed with a view toward distinguishing those cases holding for-hire carriage. A conclusion is reached from the record as a whole which includes such factors as appellee buying the sugar, assuming both physical and credit risks for same, having no transportation charges billed to his purchasers, having a small percentage of his assets tied up in transportation facilities, and having a reasonable inventory of sugar, to name a few, that appellee is a private carrier.

The decision of the district court is discussed to point out that such court properly considered the primary business test in reaching its decision. A technical defense is then considered since appellee has never been charged with the violation of the section of the Interstate Commerce Act (Section 203c) upon which appellants seek a reversal in this case, nor was the investigation producing the record in this case ordered to investigate a violation of such section.

Finally appellee argues that as a matter of policy, private carriage deserves as much protection as any other type and that the Congress so intended.



## ARGUMENT

### **The Court Below Correctly Applied the Standard to Determine if the Interstate Commerce Commission's Findings are Supported by Substantial Evidence**

The courts have set out the standard for determining whether or not an order of the Interstate Commerce Commission should be permanently enjoined, annulled and set aside. Different courts use different language to determine this test; however, possibly, all the tests are the same or at least are similar to the extent that the difference is only in the language used. In *Scott Truck Line, Inc. v. United States of America and Interstate Commerce Commission*, 163 F. Supp. 118, (D. Colo., 1958) the court stated that it would not examine the facts further than to determine whether there was substantial evidence to sustain the order. In *ABC Freight Forwarding Corp. v. United States of America and Interstate Commerce Commission*, 125 F. Supp. 926, (S. D. New York, 1954) the court said that the issue for the court to decide is whether the action of the Commission was arbitrary or capricious. In *Arrowhead Freight Lines, Ltd. v. United States, et. al.*, 114 F. Supp. 804 (S. D. Calif., 1953) the court stated that there must be sufficient evidence in the record to enable the court to determine that there is some rational basis for the Commission's administrative conclusions.

### **The Examiner's Report Should be Considered in Applying the Substantial Evidence Rule**

The Interstate Commerce Commission in their opinion in the case at bar found that the statement of facts in the examiner's report was adequate in all

material respects and, as modified in said opinion, said Interstate Commerce Commission adopted said examiner's report as their own (R. 20).

The transcript contains a verbatim copy of the examiner's report and recommended order. (R. 10-15) It should be noted that the examiner in the case at bar, after having heard all the witnesses, found all the facts and the law in favor of appellee and recommended that the investigation as to appellee be dismissed. Whenever there is an examiner involved, and the examiner finds against the individual party (and in favor of the governmental agency) and later the substantial evidence rule comes into play, regardless of the state of the record, there is always the specter lurking behind the whole case that the examiner did not believe the testimony of all of the individual's witnesses and that, therefore, the individual had no evidence to support his contentions. This would mean that through presumptions, taken together with the substantial evidence rule, the governmental agency would have sustained its burden before the courts. In the case at bar, however, the above is completely inapplicable, because the examiner has ruled straight down the line in favor of appellee; consequently, the examiner, after having heard, in person, all of the witnesses, was satisfied that the evidence given by the witnesses for appellee was true and that from the facts the matter should have been dismissed.

The cases go further, however, in upholding the validity of the examiner's report, and do not limit the worth of the examiner's report to merely preventing it from being said that all of the material evidence elicited

from the individual's witnesses was not believed. Instead the cases give the examiner's report some affirmative worth in a case such as the case at bar, in that it requires a more severe study of the record in order to uphold the governmental agency's order under the substantial evidence rule.

To proceed to an analysis of the cases, the attention of the Court is directed to the Administrative Procedure Act, Section 1 et. seq., 5 U.S.C.A. Section 1001 et. seq., the pertinent section thereof being found in the Appendix of this brief at page 59. The Act discusses the review by the courts of orders by a governmental agency. *Coyle Lines, Inc. v. United States*, 115 F. Supp. 272 (D. La., 1953) holds that the above quoted sections of the Administrative Procedure Act is applicable to Interstate Commerce Commission proceedings. It is unquestioned from a reading of the Act that proceedings before the Interstate Commerce Commission would clearly come under the terms and conditions set up in the Act.

Proceeding further an important case in the "substantial evidence" field is *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474 (1951). The Supreme Court first states that the standard of proof required of the National Labor Relations Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act. (Since the Interstate Commerce Commission proceedings would come under the Administrative Procedure

Act this case would be full authority for the case at bar). The Court then continues as follows:

"Whether or not it was ever permissible for courts to determine substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record.

" \* \* \* Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

" \* \* \* The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before the Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of the witnesses or its informed judgment on matters within its special competence or both."

The Court continued by stating in effect that the Court of Appeals in determining substantiality of evidence to support the National Labor Relations Board order was not barred from taking into account the report of the Board's examiner on questions of fact if-

sofar as the examiner's report was rejected by the Board, but rather all of the examiner's findings were to be considered along with the consistency and inherent probability of testimony. The Court then considered Administrative Procedure Act Section 8 (b), 5 U.S.C.A. Section 1007 (b) which states: "All decisions (including initial, recommended or tentative decisions) shall become a part of the record \* \* \*"

At page 467 of the opinion the Court continues by stating from the Attorney General's Committee on Administrative Procedure:

"In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown."

The Court continues at page 469:

"We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. We therefore remand the case to the Court of Appeals. On reconsideration of the record it should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial \* \* \*"



A good case discussing the substantial evidence rule is that of *United States ex. rel. Lindenau v. Watkins*, 73 F. Supp. 216 (S. D. New York, 1947). Reference is here made to such opinion which discusses in great detail the substantial evidence rule and its legislative history and basis. There the court states that in a review of administrative action "substantial evidence" is evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of fact which is sought to be sustained, and it implies a quality of proof which induces conviction and which makes a definite impression on reason. The Court continues by stating that it is no longer sufficient that the findings be supported by some evidence and that there must be more than a scintilla of evidence and more than suspicion or surmise, and that it must be more satisfying than hearsay or rumor. In other words, the Court seems to state that in the substantial evidence test, the word "substantial" is placed there for a purpose.

#### **A Discussion of the Primary Business Test Prior to the Congressional Amendment of 1958**

If its opinion found in the record in the case at bar (R. 17-31) the Interstate Commerce Commission finds that under the "primary business" doctrine, the transportation of sugar by appellee is not in furtherance of his primary business and that, therefore, appellee is not a private carrier of sugar, but, instead, is either a contract or common carrier. An examination of the cases on the "primary business" test should be in order at this time. The leading case in this field is *Brooks Transportation Co., Inc. et. al. v. United States, et. al.*, 93 F. Supp. 517. (E. D. Va., 1950), affirmed.



340 U. S. 925. In the *Brooks* case the Brooks Transportation Co. brought a suit against the United States and the Interstate Commerce Commission to enjoin, vacate and set aside orders of the Commission holding that a furniture manufacturer which delivered some of its furniture to customers in its own trucks and that its parent corporation which delivered liquors in its own trucks to customers were private carriers.

In the case the court held that if it is established that the primary business of a concern is the manufacture or sale of goods which the concern transports itself in the furtherance of its primary business, and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage, even though a charge for transportation is included in the selling price or added as a separate item. Although the delivery of the items in the *Brooks* case was somewhat different from the case at bar, in that the company's trucks in the *Brooks* case delivered the items from the place of business to the customers; the case is still similar to the case at bar, since when the trucks returned to the factory they brought back materials needed at the factory. In the case at bar the Interstate Commerce Commission is complaining about the bringing of sugar back from *Supreme*, Louisiana, by appellee when the truck may have been used to deliver other items such as grain, cattle, etc. in that general area (which other items have never been questioned by the Commission). It should also be pointed out that in the *Brooks* case there was a definite transportation charge made, which charge has never been made by appellee, and still the *Brooks* case held the carriage to be private.

The court in the *Brooks* case states:

"The Commission in deciding that Lenoir and Schenley were private carriers as opposed to contract or common carriers applied what is known as the primary business test. In other words, if it is established that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that business and the transportation is merely incident thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added as a separate item."

As previously pointed out the case at bar is a situation where the question of transportation is the return of merchandise rather than the sale of merchandise from the manufacturer, but the principle appears to be the same, and evidently the Interstate Commerce Commission believed that the primary business test should be applicable herein because they use same as part of the basis for their decision and quoted the *Brooks* case in their opinion in the case at bar.

In its application of the *Brooks* case to the case at bar the Interstate Commerce Commission seems to ignore the fact that appellee is in a general mercantile business and that all of the items sold by appellee, with the exception of sugar, have been expressly approved by the Interstate Commerce Commission as part of the business of appellee, (R. 23), this being so even though appellee has stated that prior to his being engaged in the sugar business he brought back other items in his

trucks in his business in the Louisiana area, which was done in the identical manner as is now done in the sugar phase of his operation, (R. 113), but which has been held to be entirely permissible and legal. In its application of the "primary business" test the Commission seems to read into the test more than is therein contained. They appear to take each item sold by appellee separately and to decide that the "primary business" test must be applied to that separate item. Appellee submits that the test does not so limit itself. Instead it is necessary to scrutinize the operations of appellee as a whole, and that as a whole and from the complete record appellee is in a general mercantile business dealing with various types of items including sugar. That applying the test in this manner, it is obvious that the transportation of sugar from Supreme, Louisiana, to San Antonio, Texas, by appellee is certainly in furtherance of a primary business enterprise, which is the general mercantile business of appellee. From the evidence it is also clear that the transportation of sugar by appellee is in furtherance of the sugar phase of the business which is a primary business enterprise. This is pointed out by the fact that appellee purchases the goods in his own name, has no preexisting orders for same, has only a reasonably small percentage of his assets tied up in transportation facilities and only part of his transportation facilities are used for the transportation of sugar. Also he is selling the sugar at the going market price in San Antonio and obtaining the going profit therefor, is maintaining a reasonable inventory of sugar on hand (up to 50,000 pounds), is responsible for any loss or damage to the sugar, and is selling sugar on credit and having substantial accounts receivable tied up in sugar (as much as \$20,000 or

\$30,000). Appellee submits, however, that by applying the "primary business" test to the general mercantile business as a whole that *a fortiori* he is a legitimate sugar merchant.

The *Brooks* case discusses various reasons why a concern might want to deliver in its own trucks rather than use a common carrier, such as the absence of congestion at loading docks, the safe arrival of goods not mixed with those belonging to others, the control over the time of delivery, etc.

Some interesting cases in this field will now be discussed. These cases were referred to by appellant, appellant carrier, and amicus curiae but appellee would like to give his views concerning such cases. The first is *Interstate Commerce Commission v. Clayton*, 127 F. 2d 967, (C. A. 10, 1942). In that case Clayton resided in Ucon, Idaho, and maintained a small coal yard at his home where he kept about a truck load of coal on hand. He purchased the coal in Utah and paid for the coal with his own funds and sold both for cash and credit. He solicited orders before transporting the coal and after he had transported the coal. He did not purchase the coal to fill any particular order and many of the orders were taken by his wife while he was going to buy the coal. He sold from his truck and if any coal remained he stored it at his home. From time to time he filled orders for coal from that stored in his home yard. (Certainly the facts in that case are not as strong for private carriage as in the case at bar). The court specifically mentioned that Clayton had not indulged in any subterfuge or design to avoid the requirements of the Interstate Commerce Commission Act (there is

no showing whatever of any subterfuge or design in the case at bar). The court found the carriage to be private.

The next case is *Interstate Commerce Commission v. Tank Oil Corporation*, 151 F. 2d 834. (C. A. 5, 1945) In that case the appellee owned twelve filling stations and controlled four others. During the period of time in question he transported about 168 tank cars of gasoline to his own stations and about 165 tank cars of gasoline to the stations controlled, and to customers generally. No charge for freight or transportation as such were quoted or made (the same is true in the case at bar). The appellee had no storage tanks of its own (appellee in the case at bar does keep inventories of sugar). The appellee was engaged in transportation to the extent that it enabled it to keep its trucks in full operation and to realize a profit on the sale of the gasoline. The court pointed out, however, that the appellee bought the gas itself, ran the risk in case of loss of cargo and the failure of customers to pay. The court considered the *Clayton* case above discussed and the case of *Interstate Commerce Commission v. Stickle*, 128 F. 2d 155. (C. A. 10, 1942), certiorari denied, 317 U. S. 650 which will be hereinafter discussed, and in holding the carriage to be private stated:

“Congress not only intended to say, but said, that if a person, in good faith, transports his own property for the purpose of sale or in the furtherance of his own commercial enterprise, he is a private carrier”.

The language of the court would certainly apply to the facts in the case at bar and require appellee to be held to be a private carrier.



In *McBroom Contract Carrier Application*, 1 M.C.C. 425 (1937), it was merely held that the ownership of the goods alone is not conclusive to establish private carriage. There was a situation of a backhaul where the goods were sold for approximately the cost to the applicant plus the cost of transportation. It was found that further inquiry was necessary to develop the complete fact situation.

In *Lyle H. Carpenter*, 2 M.C.C. 85, (1937), it was found that the hauling of coal was only in full truckloads with no inventories kept, the transportation was performed for anyone upon request and to fill pre-existing orders. The mere fact that the coal was purchased with the transporters own funds was insufficient to show private carriage. This was contrasted with the *Congoleum-Narin, Inc.* case, 2 M.C.C. 237 (1937), where it was found that where the applicant owned and operated its own trucks and transported its own manufactured goods between its manufacturing plants and from its manufacturing plants to wholesalers and retailers, and also transported its raw materials from terminals of line-haul carriers to its manufacturing plants that its carriage was private. It should be remembered that the *Brooks* case, *supra*, talks not only of the primary business of a concern being the manufacture of goods but also permits the primary business of a concern to be the sale of goods, which is appellee's situation.

In *L. A. Woiteshek; Common Carrier Application*, 42 M.C.C. 193 (1943), the Interstate Commerce Commission found that each case must be determined upon its own particular facts and neither the receipt of com-



pensation for transportation identifiable as such nor the existing of some noncarrier business to which the transportation may be incidental is *alone* conclusive. The examiner in the case at bar quoted from the *Woiteshek* case as part of the basis for his recommended order that the proceedings against appellee should be discontinued (R. 14) In the case at bar the examiner found from the evidence that appellee had been in business for almost twenty-three years and never engaged in any important truck operations. That it has a storage facility in San Antonio to maintain inventories of sugar, have only a small portion of the assets of the company tied up in transportation facilities, and have no identifiable transportation charges made to the purchasers of the sugar. That appellee has no basis or formula to determine transportation charges but instead the sales are governed by the market price of sugar in San Antonio. That appellee does not hold himself out to the general public to haul sugar for compensation, but that he is engaged in a bona fide business of buying and selling many items including sugar and that under the "primary business" doctrine described in the *Woiteshek* case, appellee is a private carrier. As the Interstate Commerce Commission stated in *Lenoir Chair Co.*, 48 M.C.C. 259 (1948), affirmed 51 M.C.C. 65 (1949), which in the courts became the *Brooks* case, *supra*,:

"We do not mean that a private carrier may not under the law realize an incidental profit in the conduct of its motor carriage without forsaking or endangering its private carrier status \* \* \* Each case must be determined on its own facts."

The Interstate Commerce Commission in the *Woiteshek* case refers to the *Clayton* case, *supra* and to the *Sticklé*

case, *supra*,<sup>1</sup> and notes that both cases were then recent cases and further that they were decided one day apart with two of the three judges on each court being the same on both cases. In the *Clayton* case previously discussed the court found the carriage to be private.<sup>2</sup> In the *Stickle* case which will be discussed later,<sup>3</sup> almost the same court found the carriage to be other than private. The Interstate Commerce Commission in the *Woiteshek* case states that reading the two cases together it is clear that the court based its conclusion in each case on the primary business of the operator. The Commission then held that in the *Woiteshek* case the facts establish that the applicant was engaged in a bona fide non-carrier business and that the transportation which he performs in connection with his direct sales, which are sales which are almost all on prior order and involve transportation of materials from the sources of supply to the place of use, was private carriage. The Commission stated that his so-called direct sales are performed solely as an incident of and in furtherance of his non-carrier business without any purpose to profit from the transportation as such. The facts showed that the so-called direct sales comprised approximately forty per cent of the gross revenue of all

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<sup>1</sup> *Interstate Commerce Commission v. Clayton*, 127 F. 2d 967 (C. A. 10, 1942); *A. W. Stickle & Co. v. Interstate Commerce Commission*, 128 F. 2d 155 (C. A. 10, 1942), certiorari denied, 317 U. S. 650.

<sup>2</sup> A discussion of the *Clayton* case is found on page 17 of this brief.

<sup>3</sup> A discussion of the *Stickle* case is found on page 34 of this brief. It is thought that the fact that the Courts in the *Stickle* and *Clayton* cases are composed of virtually the same judges is important in considering the cases. Since it points out how the same judges determine the factors important in considering the difference between private and non-private carriage, and how they arrive at different results when the fact situations are altered.

the company sales and where the selling price was computed by adding to the anticipated cost a dealer profit plus a sum sufficient to cover the cost of transportation. The Commission stated in its opinion in the *Woiteshek* case that certain facts were particularly significant in the case — among them being that applicant had been in business for twelve years during most of which period he conducted no important motor carrier operations; also his transportation charge, when transportation is furnished, is based on his actual cost experience without any profit added.

Carrying the Commission's reasoning over to the case at bar, appellee could become a private carrier with the blessing of the Commission if he would not deliver cattle or other goods on his movements to Louisiana, but would merely send an empty truck over to Louisiana to return with sugar and would then add to his cost of the sugar plus his desired profit, his actual transportation cost to obtain such sugar. Is appellee any less a private carrier if he delivers other commodities on the way to Louisiana and then purchases sugar at the going price and returns it to San Antonio where he sells it at the going market price?

As to the various cases cited by appellant carrier concerning the fact that said appellant carrier believes that the court below exceeded the permissible limits of judicial review as laid down in numerous court decisions, suffice it to say that there is not involved in this case a question of the credibility of witnesses and the weight of evidence insofar as the facts are concerned. Nor is this a case where the trial court improperly substituted its own judgment for the administrative

judgment. Instead the facts in the case are virtually undisputed and the question involves one of law as to whether there is substantial evidence in the record to support the judgment of the Interstate Commerce Commission. Certainly a court is authorized to substitute its own judgment for that of the Commission as to a question of law concerning whether the "primary business" doctrine is to be extended to a fact situation such as in the case at bar. As stated in his motion to dismiss appeal or to affirm in this case, appellee does not quarrel with the fact that the Interstate Commerce Commission has done an excellent job in the transportation field. Sometimes, however, such an agency with the best of intentions, may attempt to regulate certain individuals in a manner that they believe is for the public good, but as a result some innocent person or concern is caught in the shuffle and a legitimate and bona fide business is consequently interfered with. Appellee submits that in such a situation it is for the courts to scrutinize the situation and protect the injured party, which is exactly what the trial court did in the case at bar.

The case of *Interstate Commerce Commission v. Asphalt Supply Company*, 152 F. Supp. 559, (N.D. Tex., 1957) was a situation where the transportation was as a result of pre-existing orders and the asphalt supply company took the place of a contract carrier at the identical rate of transportation charge. Also the major portion of Asphalt's investment was in transportation facilities.

In *Vincze v. Interstate Commerce Commission*, 267 F. 2d 577, (C. A. 9, 1959) the court found sufficient evidence in the record that the defendants, act-

ing in concert, were a single operating company. This was a case of a plan or scheme to evade the Motor Carrier Act which appellee will discuss later. Also the *Vincze* case was decided after 1958 and those later cases will be discussed in a separate group.

The case of *Lamb v. Interstate Commerce Commission*, 259 F. 2d 358, (C.A. 10, 1958) is a case where there was subterfuge in a leasing arrangement, which the facts showed was not truly a leasing arrangement in substance. Actually there have been several cases cited involving leased trucks, but since that problem is not directly involved in the case at bar, appellee will not discuss those cases.

**The Congressional Amendment of 1958 Merely Codified the Previously Existing Case Law Even Though the Arguments of the Various Appellants Read More into such Amendment**

Since the question of Congressional intent is an important factor in this case, it would be well at this point to discuss the amendment of Section 203 (c) of the Interstate Commerce Commission Act in August of 1958, by the addition of the following language:

Nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person. Section 203 (c) of the Interstate Commerce Act, 49 U.S.C. §303 (c).

The complete section has not been quoted herein since it may be found in the record as part of the Interstate



Commerce Commission's opinion (R. 25) as well as in appellant's brief at page 36. This amendment was made after the examiner's report was filed on August 29, 1957, and before the opinion of the Interstate Commerce Commission on August 3, 1959.

As stated in the opinion of the Interstate Commerce Commission:

“Amendment of this section had the effect, among other things, of writing into the act our usual or ‘primary business’ test by which we determine whether questioned transportation activities of those also engaged in business enterprises other than transportation are within the scope of lawful private carriage or of motor-carrier operations for compensation for which authority from this Commission is required. (R. 25)”

Appellee agrees with the language of the Commission above quoted, at least that the amendment merely incorporated the “primary business” test into the statute rather than having same merely applied by case law. The only quarrel that appellee might have would be that the amendment wrote into the statute the “primary business” test as applied by the courts as opposed to the test as applied by the Commission.

Be that as it may, it appears that even though the Commission states that the amendment merely codified the existing law, that in the opinion in the case at bar, they stretched the “primary business” test all out of proportion and, impliedly, or otherwise, by their opinion, hold that the amendment has changed the law and placed a more severe burden on an individual to



show that transportation is private carriage. On page 344 of their opinion (R. 26) the Commission states:

"The Shannons are engaged in buying and selling livestock and certain related items including, according to their contention, sugar. Similarly we are concerned here with how their sugar dealings differ, if at all, from their dealings in the other commodities, and how their sugar transportation activities which are admittedly in furtherance of their primary business".

Giving the Commission the benefit of the doubt evidently the Commission intended to say as follows:

"Similarly we are concerned here with how their sugar dealings differ, if at all, from their dealings in the other commodities and how their sugar transportation activities differ, if at all, from their transportation activities which are admittedly in furtherance of their primary business".

Since the evidence is clear that they handle their sugar in the same manner as they have handled other items and continue to handle other items, and further that the Commission has approved the other items as part of the primary business of appellee, (R. 23) it is difficult to see how sugar transportation can be considered different from any of the other items; and since the sugar dealings do not differ from transportation of other items, it is difficult to determine how the Commission under the "primary business" test could hold appellee's actions not to be private carriage.

Evidently the Commission even though stating that the amendment of the act only codified the existing law, really believes that the amendment changed the

law; otherwise it could not have held that appellee's activities were not private carriage. Reference is made to Appendix B found on page 350 of the Commission's opinion, same being a portion of the House Report which was taken from the Committee studying the amendment to the Interstate Commerce Commission Act. H. Rep. 1922, 85th Cong. 2d Sess. (R. 34-37) Part of the report is as follows (R. 35):

"In addition, business which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise and transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost."

Appellant carrier makes the same quotation on page 30 of their brief but fail to italicize the last sentence which appellee submits is at least as important as the rest of the quotation.

It is obvious that the Committee by its recommended amendment of the act was intending to prevent subterfuge in this field and the prevention of prearranged plans to stop the real consignee from receiving transportation at a reduced cost. It is obvious that the Committee did not intend to recommend the passage of an amendment which would change a bona fide

merchandising venture, such as in the case at bar, into something other than private carriage. Nor did the amendment create a situation where "for hire" carriage is automatic whenever there is a backhaul, the hauler uses his trucks exclusively to haul the product, and does not change the form of the product by some further process. Yet the Commission reached this result and appellant and appellant carrier argue for this result even though the record is full of many factors showing private carriage; since according to their interpretation of the "primary business" test, these other factors should be ignored. This could not be the interpretation the Congress intended when the Act was amended in 1958. The amicus curiae does not urge the same interpretation as the various appellants, but only wants it made clear that the "primary business" test is applicable to the case at bar without taking a position, as to what final conclusion should be reached as to the application of such test to the present fact situation.

The Committee hearings from the Senate on Page 348 of the Commissions' Report S. Rep. No. 1647, 85th Cong. 2d Sess. (R. 31-34) and from the House above referred to, make it clear that it was not the intent of such Committees in their recommendation to Congress to change the "primary business" test set out in the *Brooks* case, *supra*. As stated in the House Report, that there was no intention on the part of the Committee in any way to jeopardize or interfere with bona fide private carriage as recognized in the *Brooks* case. It was even suggested to the Committee that the definition of "private carrier" be changed. Actually, as stated in the Committee's Report it was the Interstate

Commerce Commission that proposed this amendment by adding a proviso to the definition of private carrier in the Act; that any person who purchases, transports and sells property for the purpose of fostering a highway transportation business is engaging in a public transportation service. The Committee refused to go along with the amended definition and stated that they had no intention of unsettling the "primary business" test, which would then require another long series of litigation, which finally culminated in the *Brooks* decision. It would appear that in its opinion in the case at bar the Commission proceeded as if the Act had been amended as requested by the Commission, although it is a question that, even if the act had been amended as requested by the Commission, that appellee's actions would be considered not to be private carriage.

Certainly the Congress did not intend for individuals such as are involved in the case at bar to be unable to buy and sell products, including sugar, when they are and have been for many years in the general mercantile business, which is the "primary" business, with sugar being one of several of their commodities bought and sold. There is no evidence whatsoever in the case at bar of "prearranged plans" set up in order that the real consignee may receive transportation at a reduced cost. Appellee believes that the Congress made its intent clear when it refused to change the definition of "private carrier" but instead reiterated the fact that it wanted to codify the "primary business" test in the *Brooks* case. Appellee submits that the examiner was eminently correct in finding that under the "primary business" doctrine appellee's transportation constituted private carriage. Certainly appellee is legitimately in

the sugar business and the hauling thereof is private carriage, and there is no substantial evidence in the record to show otherwise.

Reference is made to Appendix A of the Senate Report at page 349 of the Commission's opinion, where the sub-committee recommends S. Rep. No. 1647, 85th Cong. 2d Sess. (R. 33, 34):

"What is needed, in the opinion of the sub-committee, is a further prohibition to the effect that no person in any commercial enterprise other than a duly authorized or specifically exempt for-hire transportation business shall transport property by motor vehicle in interstate or foreign commerce unless such transportation is *solely* (italics ours) within the scope and in furtherance of a primary business enterprise (other than transportation) of such person."

By reading the actual amendment (R. 25), it is obvious that the word "solely" was omitted, so that the Congress did not follow the sub-committee's recommendation and limit the primary business test by the use of the word "solely". This would certainly show that the Congress intended for there to be some leeway in the determination of "primary business". It is also worth noting that in the amendment "a" primary business enterprise is used instead of "the" primary business enterprise, which again seems to imply that there should be more leeway given in the determination of what is a "primary business" enterprise and that an individual could have more than one "primary business" enterprise.



Of course, it is not what the Interstate Commerce Commission recommended, nor for that matter what the various Congressional committees recommended that is important in this matter, but instead it is what the Congress actually enacted into law that is material. It is clearly evident that the "primary business" test was placed in the statute as it had previously existed in the case law. This meant that there was no greater burden placed on an individual to show that transportation was private carriage after the amendment of the Act than before. Appellee believes, however, that even though appellant did not receive from the Congress the type of legislation necessary to transform an operation such as appellee conducts into something other than private carriage, that appellant is working under the assumption that it did so receive such Congressional license and as a result has found appellee's operations to be for-hire carriage. Appellee believes that such a finding is not proper under the facts of the case at bar taken together with the "primary business" doctrine as it presently exists in the statutory and case law.

**A Discussion of the Authorities Since the  
Congressional Amendment of 1958**

Those cases decided since the adoption of the Congressional amendment of 1958 all seem to present a different factual situation from the case at bar. This is true even for those cases decided by the Interstate Commerce Commission. Even in the case of *Fraering Brokerage Co., Inc.—Investigation of Operations*, Docket No. MC-C-1994, (1959), decided at the same time and with the same opinion as the case at bar, (R. 17-31), one difference is that Fraering never took title to the sugar in question. The producer of the sugar was



paid by the consignee f.o.b. sugar producer's refinery, and any transportation charge for carriage performed by Fraering belonged to Fraering although it was sometimes collected by Fraering and sometimes collected by the refinery for Fraering. Fraering brokered certain grocery items but most of its profit came from its wholesaling operations.

In *Subler Transfer, Inc.—Investigation of Permits*, 79 M.C.C. 361, (1959) Subler paid the refineries upon payment by the purchasers from it. The brokers considered the ultimate purchasers as their customers and there was in evidence a letter between Subler and the brokers showing that the brokers considered that Subler had provided nothing but transportation service. Subler also operated under an Interstate Commerce Commission certificate and permits in other of its operations. The same drivers handled the driving concerning the sugar that drove in Subler's motor carrier operations. Also the bulk of Subler's sugar shipments were to fill prior orders. The Commission distinguished the case of *Taylor v. Interstate Commerce Commission*, 209 F. 2d 353, (C.A. 9, 1953) certiorari denied, 347 U.S. 952 (1954). Appellee will discuss the *Taylor* case later in this brief.

*Virgil P. Strutzman*, 81 M.C.C. 223 (1959), is a case where Strutzman advertised as a truckline. He had a storage facility which was a garage, but all he had in it beside an auto was a small inventory of salt, but the salt inventoried was not the type ordinarily transported by him. The evidence showed that the appearance of the garage showed that it was little, if ever, used for warehousing. The price of the salt was fixed

to yield Strutzman a return of twenty-five cents per mile plus a ten-dollar charge for unloading. Strutzman was usually paid on delivery and the major portion of his capital investment consisted of motor vehicles.

In *Mumby Investigation of Operations*, 82 M.C.C. 237 (1960), there were instances where the refinery had billed Mumby's customers directly. In a number of transactions Mumby had added a separate freight charge to the f.o.b. refinery price of the sugar so as arrive at the total amount to be paid by the customer. As to his dealings in flour, all of the flour handled with but one exception had been for the account of Koerner, who on occasion called the mill direct to purchase same who in turn told Mumby. The markup of the flour varied with the distance traversed but remained constant between particular points.

In the case of *Church Point Wholesale Beverage Co. v. United States*, 200 F. Supp. 508, (W.D. La., 1961), the District Court of three judges found prohibited transportation; however, in that case most of the goods purchased were purchased with pre-existing orders, no inventories were kept, and the marketing area was hundreds of miles beyond the plaintiffs' selling of their other products. The significance of the fact that the United States Court of Appeals Judge on the court in the *Church Point* case was the same judge that sat on the case at bar<sup>o</sup> (Judge John R. Brown) will be discussed later.

#### The Facts of the Case at Bar Indicate Private Carriage

Appellee submits that the introduction into evidence of the railroad and trucking freight rates from

Supreme, Louisiana, to San Antonio, Texas, are irrelevant to any issue in this matter. The freight rates were relevant in a case strongly relied upon by appellant in the court below and before the Commission. That case is *A. W. Stickle & Co. v. Interstate Commerce Commission, supra*.<sup>4</sup> However, there are so many differences between the *Stickle* case and the case at bar that it will be hard to list them all.

In the *Stickle* case the rates were relevant because they showed that the profit *Stickle & Co.* obtained for their sale of lumber was the same as the freight rate, so that, in effect, all that *Stickle & Co.* was doing was obtaining money for freight under the guise of being in the lumber business. However, if, as in the case at bar, the freight rate is considerably different from the average profit obtained by a sugar merchant, then the freight rate itself has no application whatsoever to a determination of whether or not such sugar merchant is actually in the trucking business. Of course, the 15 isolated sales introduced into evidence as Exhibit No. I are not conclusive of the operations of appellee and clearly apply to only a limited period of time, and the record so reflects; but, assuming for purposes of argument, that they are conclusive, they are obviously transactions selected by the Bureau of Inquiry and Compliance to prove their point — that there is in the case at bar common or contract carriage as opposed to private carriage. However, their own figures show that the average profit obtained is not the freight rate, but far from it. Instead it is simply the reasonable

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<sup>4</sup> 128 F.2d 155 (C. A. 10, 1942), certiorari denied, 317 U. S. 650. previously referred to on pages 20 and 21 of this brief.

profit of a sugar merchant in the locality where appellee operates. Obviously, appellee does not raise sugar, so naturally the cost of hauling sugar is an important factor to determine his margin of profit, since he buys and sells sugar; but storage costs, bookkeeping costs, bad debts, inventory losses, and loading costs, etc. are also important factors, and just because hauling is an element of cost does not, by any stretch of the imagination, mean that he is in the trucking business for hire.

Regardless of what one calls it, whether or not appellee is in the trucking business would invariably boil down to the question of — are his operations really subterfuge? For it would appear that in view of all the evidence in this matter, that the only way appellee's operations could be held to be anything other than private carriage, would be to find that his sugar operations are really a subterfuge; and there is absolutely no evidence in the record to show any of appellee's sugar operations are anything but legitimate and bona fide. The examiner's findings would certainly appear to be conclusive as to this. It would thus appear that unless all the evidence in the hearing is disbelieved, appellee is definitely and clearly a legitimate sugar merchant. How else could he be in the business of buying and selling sugar when he does not raise it? He buys sugar from the manufacturer, hauls it to his place of business, taking title in his own name, and bearing all the losses connected therewith; sells the sugar on credit with the attendant possibility of bad debt loss and, in the interim period, stores the sugar. What more could he do to be considered a legitimate sugar merchant? Is it necessary for him to haul by rail and pay such costs



when he has his own trucks available for hauling and has had them available over the years for his complete operation, starting with livestock, and expanding over the years to feed stuffs, grain, corn, molasses, salt and sugar.

Nor should it be said that what appellee is actually arguing is that since he made no attempt to hide his operations in sugar that he cannot be held to have engaged in any form of subterfuge. This is not what appellee is contending at all. His contention is, however, that when the Congressional Committees speak about "bona fide merchandising venture" as opposed to "pre-arranged plans being set up in order that the real consignee may receive transportation at a reduced cost"; that more is meant than simply backhauling is not private carriage unless the backhauler additionally uses other types of carriage for the same materials other than his own trucks or unless he does something to the product to change its form. Instead the entire record should be considered to determine if there is some sort of pre-arranged plan between the real consignee and the hauler whereby the real consignee is really only paying the hauler for the hauling itself. This type of plan can be either express or implied from all the facts. This is the type of subterfuge appellee submits is necessary to be shown from the entire record in order to show something other than private carriage and there is no evidence in the record to raise any question that there are any such agreements either express or implied.

On page 17 of its brief appellant quotes from the Sixty-Seventh Annual Report of the Interstate Commerce Commission which says on page 55 of said report:

" \* \* \* Sometimes the purchase and sale is a bona fide merchandising venture. In other cases, arrangements are made with the consignee of such merchandise for the 'buy-and-sell' arrangement in order that the consignee may receive transportation at a reduced cost."

The above quotation has reference to a back haul situation; however, appellee only quoted that portion of the report that is material to this discussion. The fact remains that in the case at bar there is nothing either express or implied to indicate that any arrangements have been made with any consignee. Instead appellee deals with its purchasers in sugar and many other items and sells those items at the going market price and takes the various risks incident to merchandising.

In their brief in opposition to appellee's motion to dismiss appeal or to affirm, appellant carrier, in response to the question asked by appellee concerning what more was necessary in order for him to be a bona fide sugar merchant, listed certain things. These included employing commission salesmen or brokers to develop or expand their territory, making large scale purchases of sugar, dealing in futures or engaging in hedging operations, or dealing in beet sugar. In the first place it would not seem necessary for any firm to do any or all of the above suggestions in order to be considered a bona fide merchant of sugar. In the second place appellee does deal through a broker and has a



number of sugar customers. The record also shows that appellee purchases a considerable quantity of sugar, especially in view of the fact that it deteriorates rapidly, has a small margin of profit, and a very flexible market pricewise. In the third place there is no evidence in the record that appellee failed to do any of the above. Certainly even under the substantial evidence rule, when a governmental agency wants to enjoin an individual from operating a phase of its business, it should have the burden of getting into the record the certain things that it believes that the individual does or fails to do which indicates other than private carriage. Nor should there be a presumption that because the record is silent that that should mean that the individual has either done or failed to do something that is consistent with something other than private carriage. The record in the case shows that appellee is in the general mercantile business selling many items including sugar. That he buys the sugar taking title in his own name, is responsible for same, keeps an inventory of same, sells for the going market profit to a number of customers and assumes the risk of large credit transactions to his customers. How he obtained those customers, either by advertising, employing commission salesmen, or some other method is not controlling unless appellant believed that same was in some way material to their case, in which event it should have been developed in the record. If appellee deals in futures or in hedging operations is also beside the point. There is no evidence one way or the other that appellee does so in sugar or in any of the many other products that it handles. If appellant felt that that was material it should have been developed in the record. Concerning appellee making large scale purchases of sugar, accord-

ing to the evidence in the record appellee does so and keeps a reasonable inventory of sugar on hand considering the physical character of the commodity and its price fluxuations. In reply to this appellant goes completely outside the record on page twenty-three of its brief and quotes from a *Cane Sugar Handbook* — actually to be more accurate instead of stating that there was a quote from such handbook, it should be stated that appellant merely summarizes what it considers the handbook to state. Here is a situation where the book would not even have been admissible in the original hearing in this matter, and now appellant seeks to use it for evidence in a review of the record in this case. What happened to appellee's right of cross examination? Who are the authors? Is the supposedly proper equipment available in San Antonio? How much does it cost? Would it affect the storage of other products used and stored by appellee? Would the high humidity of San Antonio have any effect on the efficiency of the machine? Would the cost of operation of the machine price the sugar over the San Antonio market? Why did appellant fail to go into this matter at the hearing by the introduction of proper evidence while appellee was developing the fact that sugar is perishable, has a short profit and a flexible market?

In the *Stickle* case, *supra*, there was a certain charge for hauling depending on where the customers were. There was practically no lumber in Stickle's inventory. In our case there was a considerable sugar inventory, considering the nature of the market in the sugar business, that is, its high perishability and its rapidly changing market price, and there are no definite charges made for hauling in the case at bar. In

fact there are no charges whatsoever made and no deliveries made but the only hauling is the bringing of the sugar from the manufacturer to San Antonio. Appellee's charges do not vary with the delivery charge as in the *Stickle* case, but his price for the sale of sugar varies strictly with the market for sugar. His entire profit comes from the buying and selling of sugar, and it is brought only to San Antonio for sale and the question of transportation rates do not even enter into appellee's charges. If his cost of hauling plus the amount for which he purchases the sugar, plus the loading, unloading, storage, etc. amounts to more than the going sales price in San Antonio, appellee loses money. Also, in the *Stickle* case, the principal payroll of the company was tied up with the paying of truck drivers and the principal assets of the company were invested in transportation facilities. In appellee's case the opposite is true. Less than twenty-five per cent of appellee's salaries are tied up in long-haul truck drivers and these truck drivers representing the less than twenty-five per cent of the salaries paid, do not exclusively haul sugar, but instead haul many other items including livestock, grain, salt, etc. Also the trucks used for hauling sugar are a small percentage of the total assets of the company and again these trucks are far from considered being used exclusively for the hauling of sugar.

Also the court in the *Stickle* case emphasized the fact that normally contracts were entered into to sell and transport the lumber to a certain purchaser before *Stickle* purchased the lumber from elsewhere. In the case at bar the opposite is true. It is also evident that sugar is a much different commodity from lumber in that it is more perishable, is subject to greater market

fluctuations, and the margin of profit for sugar is smaller. Because of this it is necessary for a sugar merchant to sell his sugar quickly to prevent the possibility of a loss, and for that reason an inventory of sugar would be considered greater, even though it did not have the same value in dollars and cents as an inventory in lumber; since it is not the practice of sugar merchants to keep large supplies of sugar on hand. Sugar must be sold quickly and at a small profit, so that it would naturally behoove appellee to sell his sugar as fast as he could, but even with this added factor, the evidence discloses that appellee does not obtain an order for sugar and then purchase same, but the contrary is true.

In the case at bar appellee has a general mercantile business and sugar is merely one line of the business. This is also different somewhat from the *Stickle* case wherein the only item sold is lumber. Also *Stickle* had a freight bill with the name and location of the consignee on it; so all *Stickle* was really doing was delivering, and the consignee had to deliver to the driver a check payable to *Stickle* for the amount of the transportation charge shown on the freight bill. In the case at bar there is no consignee. There is a purchaser, and there is no item of freight connected with the sales price in any way. Instead a sale is made at the market price on credit. Appellee reiterates that the above statements as to the facts are supported by all the evidence in the record. There is no evidence, much less substantial evidence, to the contrary.

It should be recalled that two of the same three judges decided both the *Stickle* case and the *Clayton*<sup>5</sup> on consecutive days and the facts of the case at bar are much more similar to those of the *Clayton* case where private carriage was found.

One matter to which appellant attaches much importance is the fact that appellee testified that at the present market price of sugar in San Antonio he could not profitably send over an empty truck for sugar and make a profit on the transaction without charging a higher price for the sugar. Such a statement would certainly not be controlling in this matter, even under the substantial evidence rule. The evidence disclosed that because of beet sugar's being brought into San Antonio at the time of the hearing that the market was highly competitive and that appellee could not profitably send an empty truck over to Supreme, Louisiana, to bring back some sugar. Appellee stated that he had profitably done so on other occasions and it would appear that in any general mercantile business it would not be unreasonable for the merchant to attempt to coordinate his transportation in such a manner as to obtain maximum efficiency with the least amount of empty trucks.

Appellant also argues that because at the particular time of the hearing the average profit of appellee was about thirty-five cents per hundred weight and since the transportation charges by common carrier were higher than this figure, that appellee was not

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<sup>5</sup> *Interstate Commerce Commission v. Clayton*, 127 F. 2d 967, (C.A. 10, 1942) previously discussed on page 17 of this brief.



a private carrier. There is no evidence in the record to show that appellee was underselling anyone else in his sales of sugar in San Antonio. In fact, the evidence shows that he was merely getting the going market price in San Antonio. There is also no evidence in the record that appellee was paying anything other than the regular wholesale price at Supreme, Louisiana, for his purchase of sugar. It would thus appear that, based on the market price in San Antonio, at the time of the hearing, no one could afford to use a common carrier to haul sugar to San Antonio and make a profit. Of course, to settle this question would require much speculation and assumption. There is no evidence in the record as to how the sugar business, both beet and cane, is controlled in this area, and appellee will not speculate as to that. There is also no evidence as to how other sugar merchants in this area transport their sugar to San Antonio; that is, by their own trucks or by using common carriers, and appellee will not speculate as to that. There is evidence in the record that at the time of the hearing beet sugar from other localities was depressing the market and that could possibly explain the profit per hundred weight at the time of the hearing. The point is, however, that appellee submits that the mere fact that the profit for sugar was less at the time of the hearing than the freight rate would not, of itself, or taken together with all the other evidence in the case, under the substantial evidence rule be sufficient to uphold the decision of for-hire carriage. There are many factors going into the cost of a product, including the cost of transportation, handling, loading, unloading, bookkeeping, administrative salaries, etc. Appellee believes, however, that from all the evidence, it is clear that appellee possesses all the incidents of a



bona fide sugar merchant and that his transportation of sugar to his warehouse and office in San Antonio is in furtherance of his primary mercantile business.

Another argument of appellant in the court below was that any reference to appellee's total assets is meaningless in determining the percentage of such assets employed in the sugar phase of the business, since a number of the assets relate solely to appellee's other business activities. Appellee reiterates that there are a number of costs, such as bookkeeping expenses, office equipment, automobiles for account collectors, etc., which necessarily apply to all phases of business alike. For example, even the cottage that is mentioned in the balance sheet was taken in for a bad debt (R. 88). The record does not state whether that was a bad debt for a sugar account, but inasmuch as a substantial portion of the accounts of the business relate to accounts for sugar, there is a good chance that even the cottage could relate to the sugar phase of appellee's business, showing the interrelation between the various phases of appellee's business. Appellee further states that appellant should not persist in attempting to segregate the sugar phase of appellee's business and make that a complete separate entity. The fact is that appellee's sugar business is merely one phase of a general mercantile operation, and the entire business as a whole should be considered in properly deciding this matter.

Appellee would like to say a final word about the freight rates. They would seem to have some weight if it were shown that the freight rate was the same as the profit made on the buying and selling of sugar, for then it would appear that the profit obtained was

merely for transporting the goods; but when there is no relation whatsoever between the profit obtained and the freight rates, but instead the profit merely varies with the market price of the product, it would seem that the freight rate then becomes unimportant. It would seem unusual, to say the least, that appellee could bring salt and molasses in his trucks and because he makes a larger profit on them (if he does), larger than the freight rate, he is a merchant, but because he happens to bring sugar in his trucks and the profit margin may be smaller (if it is), that he then is transformed into a member of the transportation business. In the case at bar appellee is a general merchant handling many products, including sugar. It would certainly seem strange that if he took on a new line on which he could make a profit, larger than the freight rate from the place where he purchased the goods to San Antonio, that he is not a for-hire carrier, but because the market price of sugar was lower (at least at the time of the hearing), that automatically appellee becomes a for-hire carrier. On close analysis this definitely seems to be appellant's and appellant carrier's argument and their principal, if not their only contention, that appellee is a transporter, not a merchant. It would seem to be a factor in determining that appellee was in the transportation business, if, for example, he owned a barber shop which was his primary business and then bought a truck that he used to bring a few types of hair oils to his shop but mainly to bring sugar to San Antonio. Here obviously, his sugar business would necessarily be closely scrutinized, but certainly in the case at bar, there is a distinct difference, where it is shown that appellee has been in business for years, slowly expanding his lines to now include, livestock,

grain, feed stuffs, salt, molasses, and sugar. Clearly appellee is a merchant and nothing else, and the buying and selling of sugar necessarily entails not only transportation costs, but storing costs, collection costs, book-keeping costs, etc., so that the entire assets of the business must bear its proportionate share of the costs, as in the case in all mercantile businesses where similar, but not the same, items are sold. Appellant makes much of the fact that appellee admitted that he was back-hauling to make money. The statement by appellee (R. 113) is nothing but a statement of common sense. He has sugar as one of his items to buy and sell because he can make money on it. If he could not, it would be foolish for him to continue to buy and sell it. He purchases it in Louisiana and brings it back to San Antonio to sell for the purpose of making a profit. But this does not mean that he thereby becomes a for-hire carrier nor does the "primary business" test require that he lose money on the item to make the particular item come under the doctrine.

Appellant carrier contends that the appellee contributes nothing to the sugar other than its movement from the refinery at Supreme, Louisiana. This statement is not correct. In the first place he stores some of the sugar and contributes that service, as well as the loading and unloading of same. He further takes all the risk of loss or damage and the risk of a declining market. Further he sells the sugar on credit and thereby takes the risk of a loss through bad debts. What other service is a sugar wholesaler supposed to perform?

Appellant and appellant carrier seem to take certain factors, such as the fact that appellee did not use for-hire carriage to transport sugar, or the fact that some of the sugar is delivered direct from the truck to the purchasers and attempt to create the impression that because of this the Interstate Commerce Commission was bound to hold there to be for-hire carriage in the case at bar. However, appellant and appellant carrier take all the indicia of private carriage, such as the fact that appellee purchases the goods in his own name, has no pre-existing orders for same, has only a reasonably small percentage of their assets tied up in transportation facilities, is selling sugar at the going market price in San Antonio and obtaining the going profit therefor, is maintaining a reasonable inventory of sugar on hand, is responsible for any loss or damage to the sugar, is selling sugar on credit and having substantial accounts receivable tied up in sugar, are all and each, even if true, not conclusive to a finding of private carriage. Certain cases are cited holding that any one of those items separately is not conclusive to a finding of private carriage.

The point is, however, that all of those items taken together, even coupled with the fact that appellee does not use for-hire carriage in his transportation of sugar, plus the fact that some of the sugar is unloaded directly from his trucks to the purchasers place of business, plus the further fact that appellee admits that he is in the sugar business and backhauls to make a profit — all of said factors taken together do not, under the law, show substantial evidence for the appellant's requested holding against private carriage in this case. Instead, from



the record as a whole it is evident that there is not substantial evidence to show for-hire carriage.

In the court below appellant contended that appellee's interpretation of the "primary business" doctrine is too broad and that appellee believes that anything that an operator might do to make the overall business less expensive to operate would be in furtherance of such overall business. Appellee does not contend that the "primary business" doctrine goes that far, but merely contends that it goes further than is contended and found by the Interstate Commerce Commission. As is the case in most fields of the law each case must be decided on its own merits and facts, and the "primary business" test must be applied to those particular facts. Appellee submits that in a case such as the case at bar where appellee sells many items that are somewhat related such as grains, feed-stuffs, salt and sugar, that such business is a general mercantile business and the transportation to bring the sugar back to appellee's place of business is incidental to the primary mercantile business of selling many items including sugar, just as the transportation of salt in the identical manner has been conceded to be bona fide private carriage in furtherance of appellee's primary business.

Reference is again made to the *Brooks* case, *supra*,<sup>\*</sup> when the court on page 524 when considering the history of the Interstate Commerce Act states as follows:

" \* \* \* In the 'Hearings before' the Committee on Interstate Commerce, United States Senate, 74th

<sup>\*</sup> *Brooks Transportation Co., Inc., et al. v. United States, et al.*, 93 F. Supp. 517, (E. D. Va., 1950), affirmed 340 U. S. 925 previously discussed on pages 13-29 of this brief.

Congress, 1st Session on S. 1629' (Government Printing Office, Washington, 1935), page 86, the late Commissioner Joseph B. Eastman testified as follows in response to questions asked by Senators Hastings and Wheeler (as to whether the proposed bill to regulate motor carriers would regulate the transportation by owners of their own goods being transported to their customers):

'Well, I was going to say that in instances where the trucker actually buys the products which he transports, if that is a bona fide transaction and not merely a device to evade regulation, he would be a private carrier.'

So as to clarify some of the statements made by appellant and appellant carrier in their briefs, the record shows that appellee handles many items including corn, oats, wheat, bran, molasses, sugar, fertilizer, and everything in the feed line (R. 106) and also salt. The testimony referred to does not end with "everything *else* in the feed line" which indicates that certain of the items listed are not feeds, so that appellee's business cannot simply be classified as livestock and feed on the one hand and sugar, a completely different commodity, on the other. It is also not clear from the record just how extensively appellee uses common carriers to transport its products. (R. 115-116) The only evidence is that appellee employs common carriers for livestock, grain, and different things. It is also not a proper conclusion to draw from the record that the warehouse of appellee is used primarily to process or store grains, feeds and fertilizers. Although the evidence showed that appellee had in its inventory over fifty thousand pounds of sugar (R. 81), appellant's witness stated that there were only several thousand pounds of feed-stuffs stored in the warehouse (R. 75).



**The District Court Properly Considered the  
"Primary Business" Test**

Appellee submits that the various factors found by the district court in the case at bar are most important in the application of the "primary business" test to a given fact situation. These include the relationship of non-transportation assets to transportation assets, identifiable transportation charges and a formula to assess same, pre-existing orders, maintenance of an inventory, responsibility for credit and physical risks, and others. The many cases cited by appellant, appellant carrier, *amicus curiae*, and appellee in tracing the development of the "primary business" test discuss these various factors. Just because the specific name of the test nor the specific statute is not quoted in the court's opinion does not detract from the fact that the test was thoroughly considered and a correct result reached on the fact situation before the court.

The court was presented adequate briefs raising all legal arguments by both sides of the case, but the fact that the court thoroughly considered the "primary business" test and applied it in the case at bar is pointed up by the case of *Church Point Wholesale Beverage Co. v. United States*, 200 F. Supp. 508 (W.D. La., 1961). The case is cited by all appellants and an extensive quotation therefrom is found on page thirty-two of the appellant carrier's brief. There the court after a thorough discussion of the "primary business" doctrine found for-hire carriage. The case is different from the case at bar in that most of the goods purchased in the *Church Point* case were to fill pre-existing orders, no inventories were kept, and the marketing area was hundreds of miles beyond the plaintiffs' sell-

ing of their other products. The important point, however, is, that Judge John R. Brown from the United States Court of Appeals, Fifth Circuit was one of the three judges in both the *Church Point* case and the case at bar. The citations show that the *Church Point* case was decided first and yet after going into great detail in holding for-hire carriage under the "primary business" test, Judge Brown evidently felt that there was a distinct difference between the fact situation in that case and that of the case at bar, since a different result was reached. And it was reached after a thorough consideration of the various factors important in rendering a decision under the "primary business" test.

Appellee can only speculate as to why the "primary business" test was not mentioned as such in the case at bar by the district court, nor why it was not stated in the opinion, as complained of by appellant on page seven of its brief, that normally the sugar is back-hauled. Perhaps the district court felt appellee's position in the case at bar was an unusual one in that he was a bona fide sugar merchant, and should be protected as such, wherein in many situations there is really for-hire carriage under the guise of private carriage — cases of subterfuge where the carriage should be enjoined unless proper authority is granted. Perhaps the district court was careful not to give non-bona fide carriage any case to stretch into its fact situation so as to avoid proper regulation and at the same time to protect appellee who was a bona fide private carrier.

For whatever reason, however, appellee believes that it is clear that the district court reached the right result by following the right test. On page fourteen of

its brief *amicus curiae* in tracing the history development and meaning of the "primary business" test discusses the *Stickle* case.<sup>7</sup> There the very factors that the district court considered are discussed in determining the application of the test; i. e., the major portion of the payroll went to employees engaged in transportation activities, the lumber was normally purchased to fill pre-existing orders, etc.

**There is a Technical Defense Available to Appellee  
in the Case at Bar**

Appellee has never been charged with a violation of Section 203 (c) of the Interstate Commerce Act, but instead, has only been charged with the violation of Section 206 (a) (1) or 209 (a) (1) of said Act.<sup>8</sup> (R. 55, 56), and the investigation was ordered to determine if there were violations of said sections. The Interstate Commerce Commission ultimately found that appellee had violated either one or the other of said sections without specifying which. It should be remembered that since the Congress expressly refused to change the definition of "private carrier" as defined by the Interstate Commerce Act, when the amendment of 1958 previously discussed was enacted into law; and since the Interstate Commerce Act in its definition of "private carrier" includes any person not included in the

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<sup>7</sup> *A. W. Stickle and Co. v. Interstate Commerce Commission*, 128 F. 2d 135, (C.A. 10, 1942), certiorari denied, 317 U.S. 650 (1942) previously discussed on pages 18-21 and 34-42 of this brief.

<sup>8</sup> Appellant's brief on pages 36 and 37 set out the pertinent portions of said sections. Section 206 (a) pertaining to the necessity of a common carrier to have a certificate of public convenience and necessity and Section 209 (a) requiring a contract carrier to have a permit.

definition of "common carrier" or "contract carrier", and since Section 203(c) of the Interstate Commerce Act<sup>9</sup> adds the "primary-business" test into the statutory law by prohibiting any for-hire transportation business by motor vehicle in interstate or foreign commerce without a certificate or permit, and by prohibiting any person engaged in any other business enterprise to transport property by motor vehicle in interstate or foreign commerce for business purposes, unless such transportation is within the scope, and in furtherance, of a primary business enterprise other than transportation; it seems that a new classification may have been enacted into the Interstate Commerce Act. In the case at bar appellee is not a "common carrier" since he does not hold himself out to the general public to engage in transportation;<sup>11</sup> nor is he a "contract carrier" since there are no continuing contracts for the furnishing of transportation services.<sup>12</sup> If appellee is operating improperly or illegally; then he is either an improper or unauthorized private carrier, or he is a "for-hire" carrier which is something other than a "common", "contract" or "private" carrier. In either event appellee should have been charged with a violation of Section 203 (c), since that is the primary, if not the only section involved in this matter, and not Sections 206 (a) or 209 (a).

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<sup>9</sup> Section 203 (a) (17) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (17) found in appellant's brief, page 36.

<sup>10</sup> Found in appellant's brief, page 36.

<sup>11</sup> Section 203 (a) (14) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (14) found in appellant's brief, page 35.

<sup>12</sup> Section 203 (a) (15) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (15) found in appellant's brief, page 35.



Of course, another interpretation would be that the addition of Section 203 (c) of the Act made the various carrier definitions too vague, general, uncertain and indefinite for proper administration or the opinion of the Interstate Commerce Commission in the case at bar does not meet the standard of definiteness required for due process under the Administrative Procedure Act.<sup>13</sup> Not only does the amendment of the Interstate Commerce Act on which the decision is based make the Act too indefinite and uncertain, but also the opinion of the Interstate Commerce Commission in making an equivocal finding that appellee has violated either one or the other of two mutually exclusive sections; that is, Section 206 (a) or 209 (a), without stating which, or making basic essential fact findings upon which to determine if either of such sections were violated, makes said opinion too indefinite to be enforced. The various fact findings necessary to show either common or contract carriage should have been made; otherwise appellee should not have been charged with the violation of said sections, and if it were some other section of the Act that appellee has violated then that should have been charged and findings made to support such charge. Of course, the Interstate Commerce Commission did not make the fact findings necessary to show either common or contract carriage since there is absolutely no evidence in the record to show that appellee could fit into the definition of either common or contract carrier. He does not hold himself

<sup>13</sup> Administrative Procedure Act, Section 8 (b), 60 Stat. 242 (5 U.S.C. Section 1007) found on page 59 of this brief. Also please see *National Labor Relations Board v. Express Publishing Company*, 312 U.S. 426 (1941) which sets up the standards of definiteness which must be met by an administrative order.



out to the general public to engage in transportation, nor does he have any continuing contracts to furnish transportation services. It should also be kept in mind that the violation of an order of the Interstate Commerce Commission is a crime under Section 222 (a) of the Interstate Commerce Act,<sup>14</sup> which lends weight to the fact that the equivocal finding is insufficient. Under said equivocal conclusion appellee would have to defend himself against a conclusion that he has committed either one or the other of two mutually exclusive violations. If there were ever a contempt action brought under the cease and desist order as propounded by the Interstate Commerce Commission, the court would be required to perform the supposedly completed administrative function of deciding, for the first time, which, if either, of the two sections has been violated by appellee. Further appellee in order not to be in violation of said order, ought to be able to determine what changes should be made in the manner of conduct of his sugar business to avoid the necessity of applying for either a common carrier certificate or a contract carrier permit. If he is a contract carrier, appellee ought to be able to be one no longer by terminating the "continuing contracts with one person or a limited number of persons" that are essential to the conclusion that he is a contract carrier, and if appellee is a common carrier, he ought to be able to cease the holding of himself out to the public, which is essential to his being such common carrier. Also under the order, if appellee is to continue in his sugar business, he must either obtain a contract carrier permit or a common carrier certificate, but from the order cannot deter-

<sup>14</sup> Quoted on page 59 of this brief.

mine which. And to reiterate if appellee has violated some other section instead, he should be so charged.

**Private Carriage Deserves Protection as Much as  
Any Other Form**

Appellee understands the problems of the appellant carrier in this case. They are regulated and argue to protect any and all of their rights which is as it should be. But they should not be granted additional rights at the sacrifice of the rights of the small businessman. Appellee believes that a man in the general mercantile business should not be prevented from using his own trucks to haul his own products in his own business, nor can he imagine that the Congress would have intended that he or a man similarly situated should be prevented from so doing.

In *Taylor v. Interstate Commerce Commission*, 209 F. 2d 353 (C.A. 9, 1953), certiorari denied, 347 U.S. 952,<sup>15</sup> the carrier bought finished lumber wholesale in Oregon and transported it to the yards of Idaho retailers who purchased it f.o.b. their yards and who did not know the carrier's source of the lumber sold nor that the lumber was brought in the carrier's trucks. The carrier purchased lumber at a price low enough to make a profit after he had contracted with his buyer. The court found the carriage to be private. The court in its opinion at page 354 says as follows:

"The Commission contends a policy of Congress requires us to give a liberal interpretation to the Act in favor of establishing that Taylor is a contract and not a private carrier. 'Liberal' is a

<sup>15</sup> Previously discussed in this brief on page 32.

weasel word in this connection. The policy of the Act declares as follows:

‘It is hereby declared to be the national transportation policy of the Congress to provide fair and impartial regulation of *all modes* of transportation subject to the provisions of this Act, so administered as to recognize and *preserve the inherent advantages of each*; \* \* \*’ (Emphasis supplied.) Transportation Act of 1940, §1, 54 Stat. 899, 48 U.S.C.A. note preceding section 301.<sup>16</sup>

“One of the modes of transportation subject to the Act, as having ‘inherent advantages’ is that by private carriers of their own property. This is stated in 303 (17) as follows:

‘(17) The term ‘private carrier of property by motor vehicle’ means any person not included in the terms ‘common carrier by motor vehicle’ or ‘contract carrier by motor vehicle’, who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in the furtherance of any commercial enterprise.’

“We think that in interpreting this paragraph and paragraph (15) providing for ‘contact carriers’ later considered, there is no rule of interpretation more liberal for one than the other.”

On page 356 of the opinion the court states:

“Hence Taylor, one of the smaller businessmen Congress has committees to protect \* \* \*.”

<sup>16</sup> The Motor Carrier Act of 1935 contains the same wording. Please see its quotation of page 3 of the brief of appellant carrier.

These words of the court state clearer than can those of appellee his ideas and feelings concerning the policy behind the decision to be made in this case.

### CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

EMMA SHANNON AND RICHARD J. SHANNON  
D/B/A E. AND R. SHANNON, *Appellee*

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## APPENDIX

Section 222 (a) of the Interstate Commerce Act, 49 U.S.C., §322 (a), provides:

Any person knowingly and wilfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise provided herein, shall, upon conviction thereof, be fined not less than \$100.00 nor more than \$500.00 for the first offense and not less than \$200.00 nor more than \$500.00 for any subsequent offense. Each day of such violation shall constitute a separate offense.

Section 8 (b) of the Administrative Procedure Act, 60 Stat. 242 (5 U.S.C. Section 1007 b), provides:

Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision or subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.



APR 10 1964

JOHN F. DAVIS, CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1963

No. 406

RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants*

EMMA SHANNON AND RICHARD J. SHANNON, d/b/a  
E. AND R. SHANNON, *Appellees*

On Appeal from the United States District Court for the  
Western District of Texas, San Antonio Division

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1963

No. 406

RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants*

v.

EMMA SHANNON, AND RICHARD J. SHANNON, d/b/a  
E. AND R. SHANNON, *Appellees*

On Appeal from the United States District Court for the  
Western District of Texas, San Antonio Division

**APPELLANTS' REPLY BRIEF**

**APPELLEES' TRUCKLOAD SUGAR TRANSPORTATION  
IS FOR-HIRE CARRIAGE UNDER THE PRIMARY  
BUSINESS TEST OF THE LENOIR CHAIR-BROOKS  
CASE.**

Appellees rest their case on the proposition that their truckload sugar transportation qualifies as a lawful private carrier operation under the primary business test of the *Lenoir Chair* (or *Brooks*) case<sup>1</sup> (appellees'

<sup>1</sup>*Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. 65 (1949); affirmed *Brooks Transp. Co. v. United States*, 93 F. Supp. 517 (1950); affirmed 340 U.S. 925 (1951). For a discussion of these cases see our first brief pp. 11, 24-26. The *Lenoir Chair* test, 51 M.C.C. p. 75, is:

"If . . . the primary business . . . is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed."

brief pp. 13-24). Then they argue that the 1958 amendment to section 203(c) of the Interstate Commerce Act added nothing to existing law (id. pp. 24-31). Our first brief has demonstrated, we submit, that the 1958 amendment, far from being a useless exercise, was directed specifically against buy-sell backhaul practices of the sort here engaged in by appellees, and our argument to that end need not be repeated.

We will here review briefly the undisputed facts which establish, contrary to appellees' contention, that under the *Lenoir Chair-Brooks* principle appellees are engaged unlawfully in transportation for hire. It will be recalled that the Commission commenced this proceeding on that theory in 1956 (R. 55) before it had the aid of the 1958 amendment to section 203(c). And apropos this point the Commission said (R. 26; 81 M.C.C. pp. 343-344):

"It is our view that the principal question here, whether considered prior to or subsequent to the amendment of section 203(c), inasmuch as \* \* \* the Shannons are [not] engaged in transportation as a primary business, is whether the sugar transportation operations of \* \* \* the Shannons are in bona fide furtherance of the primary business of the \* \* \* respondents, on the one hand, or, on the other, are conducted as related or secondary enterprises with the purpose of profiting from the sugar transportation performed."

And the Commission concluded (R. 30; 81 M.C.C. p. 347):

"Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, con-

stitutes for-hire carriage for which operating authority from this Commission is required."

The undisputed evidence fully supports the Commission's conclusion. Appellees are engaged in two distinct commercial enterprises. One of these is the business conducted at the San Antonio warehouse where all commodities dealt in *except truckload sugar* are stored, where some are processed, and from which deliveries are made to customers. The other business is the long distance transportation for hire of truckload sugar that by-passes the warehouse. Various features of the two businesses make this clear.

**A. The smooth and dependable coordination of the truckload movement between appellees and the truckload purchasers.**

Exhibit 1 (R. 117-118, admitted R. 62) is set forth on the following pages. We have added column 13 to the extreme right of the Exhibit to show the number of 100-pound bags of sugar in each truckload, a figure computed by dividing column 11 by column 12. Column numbers have also been added for convenient reference. Exhibit 1 was prepared by the Commission's District Supervisor at San Antonio from appellees' records, and its admission was stipulated in lieu of introducing the records under subpoena, exception being taken only to its relevance (R. 60-62).

Exhibit 1 lists appellees' principal purchasers of sugar, although sales are not limited to them (R. 70). Exhibit 1 is based on examination of appellees' documents for a three months period preceding the examination and is meant to be a representative picture of

<sup>2</sup> It is to be noted that section 203(c) before the 1958 amendment forbade, with exceptions not material here, all for-hire transportation not specifically authorized by the Commission. The amendment retained all of the pre-1958 language.



the sugar transportation (R. 65). The "Dray Receipt" (cols 4, 5) shows the date of loading apples' truck at the refinery (R. 66).

BEFORE THE INTERSTATE COMMERCE COMMISSION  
EXHIBIT No. 1

(From pages 117-118 of Record)

MC-C-2055, Emma Shannon and Richard J. Shannon,  
doing business as E. and R. Shannon, and J. T. Wilcox,  
doing business as Wilcox Brokerage Company

PURCHASES OF SUGAR FROM J. ARON & Co.,  
SUPREME, LOUISIANA

Shipment Date	Invoice No.	Date	Dray No.	Receipt Date	Cost F.O.B. Supreme, La.
(1)	(2)	(3)	(4)	(5)	(6)
5-15-56	1683	5-14	3893	5-15	\$2610.72
5-27-56	2266	5-26	4267	5-27	3068.62
6-5-56	2704	6-4	4531	6-5	3068.63
6-6-56	2751	6-6	4589	6-6	2895.17
6-16-56	3215	6-16	4887	6-16	2521.54
6-21-56	3440	6-21	5034	6-21	2928.24
7-20-56	4954	7-20	6144	7-20	3068.63
7-29-56	5372	7-28	6389	7-29	2608.76
7-31-56	5440	7-31	6437	7-31	3057.60
8-2-56	5549	8-2	6532	8-2	2602.88
8-6-56	5663	8-5	6667	8-6	2618.56
8-15-56	6100	8-15	7011	8-15	2536.73
8-23-56	6349	8-22	7228	8-23	3050.25
8-30-56	6665	8-30	7459	8-30	3058.83
8-29-56	6606	8-29	7412	8-29	2536.73

## SALES OF SUGAR BY E. AND R. SHANNON, SAN ANTONIO, TEXAS

Sales Slip No.	Date	Consignee San Antonio	Resale Price Delivered San Antonio	Differ- ence	Net Profit in cents per 100 lbs.	Number of 100- pound bags in load: col. 1) col. 12
(7)	(8)	(9)	(10)	(11)	(12)	(13)
1262	5-16	Lawler	\$2736.16	\$ 125.44	39.2	320
1267	5-29	Judson	3236.45	167.83	44.7	375
		Knowlton				
1271	6-7	Knowlton	3252.37	183.74	49	375
1273	6-8	Lawler	3034.32	139.15	39.2	355
1277	6-17	Barq's	2658.25	136.71	44	311
1283	6-23	Lawler	3069.36	141.12	39.2	360
1296	7-21	Lawler	3242.75	173.74	46.3	375
1297		Knowlton				
1298	7-30	Lawler	2734.20	125.44	39.2	320
1299	8-2	Lawler	3119.00	143.08	39.2	365
1300	8-4	Barq's	2744.00	141.12	44	321
1301	8-7	Knowlton	2775.36	156.80	48.1	326
1306	8-17	Knowlton	2673.44	136.71	44	311
	8-24	Barq's	3197.25	147.25	39.2	376
1313	8-31	Lawler	3182.55	123.72	33	375
1312	8-31	Guerra	2620.27	83.54	27	309
		(Laredo)				
			\$2125.39		35.74	
			(Total)		(Aver- age)	

The "Sales Slip" (cols. 7, 8) is a document executed in appellees' office in San Antonio showing the quantity of sugar and the price at which it was delivered to the purchaser (R. 66). The purchasers are: Lawler, a wholesale grocery company; Judson Candy Company; Knowlton, a dairy; Barq's, a bottling company; all in San Antonio; and Guerra, a wholesale grocer in Laredo, Texas (R. 67).

A frequent recurrence of the same purchasers stands out, as follows:

Lawler	7 loads to San Antonio
Judson	1 load to San Antonio
Knowlton	5 loads to San Antonio
Barq's	3 loads to San Antonio
Guerra	1 load to Laredo

The rapid time sequence between the truck loading date at the refinery (col. 5) and the sales slip date at San Antonio (col. 8) is notable; one day on 7 loads and 2 days on 8 loads. This is conclusive evidence of an assurance on the part of appellees that they can in routine fashion load a truck at the refinery with sugar worth \$2500 to \$3000 and thereafter sell and deliver it directly to the purchaser at San Antonio 525 miles away one or two days later at a profit. This accomplishment is particularly noteworthy in view of appellees' evidence about the economic risks of the operation: that the wholesale price of sugar fluctuates quickly and drastically (R. 73, 104), that the quality of sugar is peculiarly susceptible to quick deterioration that would affect its value (R. 72, 104), and that unloading a truckload of sugar into a storage warehouse instead of at a consumer's place of business entails profit-destroying costs (R. 68, 77).<sup>\*</sup> That appellees in

7 3  
the transportation of sugar have been able to avoid these normal dealer hazards is shown by Exhibit 1.

The foregoing fairly suggests that the degree of coordination in the sugar movement between appellees and the purchaser-consumer is much like the ordinary carrier-shipper relationship. The movement resembles a highly dependable motor contract carrier service far more closely than it does a sugar jobbing business with all the attendant risks and uncertainties described by appellees. All of these facts were taken into account by the Commission as bases of decision (R. 20, 23, 24) and are to be kept in mind in considering further indicia of for-hire transportation.

**B. Appellees' sugar transportation originates in a search for employment of surplus transportation facilities.**

Appellees claim to be jobbers of truckload sugar, but it is clear that they become sugar jobbers only when they have surplus transportation facilities to sell (R. 66-68, 112-113). In the ordinary course of business a jobber or shipper has goods to move and therefore looks for transportation. Appellees reverse this process; they have surplus transportation on hand and they seek a load of sugar in order to profit from the haul, just as does any carrier for hire (R. 66-68, 112-113). Appellees engage in the truckload handling of sugar only when a dominant *transportation* situation makes it economically necessary or desirable for them to do so. That transportation situation is a large empty truck in southern Louisiana that needs a backhaul to

\* See for example *Interstate Commerce Com. v. J-T Transport Co.*, 368 U.S. 81, 84-85 (1961).

San Antonio, some 500 miles away. It is the urge or need to engage in compensated transportation that brings the empty truck to the sugar refinery (R. 66-68, 112-113). Thus it is available transportation capacity that creates the sugar handling; transportation is the primary business. On this the Commission said (R. 29):

"\* \* \* the purpose of their sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks which are moving in the opposite direction."

**C. Marked difference between appellees' truckload sugar haul and their other business.**

The truckload sugar transportation from the refinery to the purchaser is a business entirely different in its physical characteristics from the enterprise carried on in connection with appellees' warehouse and feed mill. In the truckload sugar transportation it is necessary to avoid intermediate unloading at a warehouse because of the extra costs thus entailed (R. 68, 77, 110) and the possibilities of damage and deterioration (R. 72). For these reasons appellees' warehouse at San Antonio is not intended to be used, and is not used, for the storage of sugar involved in the truckload transportation operation; on an occasion where, due to a misunderstanding, a truckload of sugar was refused at San Antonio, it was necessary to store the sugar temporarily in a public warehouse because there was no room for it in appellees' warehouse (R. 77, 81-82). There could have been hardly more than 100 bags in appellees' warehouse at the time since the total inventory in both warehouses after putting the refused load in the public warehouse was only "something



over" 400 bags (R. 81-82). In this connection it is to be noted that the difference between the price paid for sugar at the refinery and the price received in San Antonio is not large enough to make the transportation profitable if public warehouse charges have to be paid (R. 77).

In contrast to the truckload sugar transportation, the sugar dealing carried on in connection with the other warehouse business consists of the sale and delivery in 1 to 25 bag lots of sugar regularly stored in the warehouse (R. 68). This sort of transaction bears no resemblance to the truckload transportation of more than 300 bags in a lot from the refinery directly to the consumer.

The Commission took into account these differences between appellees' two distinct enterprises in determining that the truckload sugar hauling is transportation for hire (R. 29-30), finding that because of its different characteristics the truckload sugar transportation was "a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage." (R. 30).

Appellees refer (brief pp. 16, 81) to their maintenance of an inventory of 50,000 pounds of sugar. That statement needs clarification. It is entirely plain from the record that on the only identified occasion when appellees claimed that large an inventory there was included in the inventory an entire truckload that had been stored in a public warehouse as above explained (R. 77, 81-82, 93-94).

D. The profit derived by appellees indicates that it is a charge for transportation.

Appellees presented evidence that at a time contemporaneous with the transactions here involved "the reasonable, normal return per hundred pounds of a sugar dealer here in San Antonio" is anywhere from 25 to 35 cents on a hundred pounds" FOB San Antonio (R. 103). On 14 representative shipments of sugar the difference between the price paid by appellees at Supreme and the price received by them delivered at San Antonio averaged 42 cents per 100 pounds, the lowest and highest figures being 33 and 49 cents, with all figures except the lowest being 39.2 cents or more (Ex. 1; R. 60-61, 117-118; computed by omitting the 27 cents figure in the last line of the last column which was a shipment to Laredo, Texas). Railroad freight rates per 100 pounds on sugar from Supreme to San Antonio are, carload 69 cents, less than carload \$1.38, and corresponding motor common carrier rates are, truckload \$1.09, less than truckload \$1.70 (Ex. 2, R. 62, 63, 78, 119-122; Exh. 3, R. 63, 64, 78, 122-126). It appears further from appellees' evidence that anyone who wants to buy sugar at San Antonio "in 25 bag lots or 50 bag lots or whatever amount they want" can obtain it "at the carload price delivered in San Antonio" less two per cent; and "that is the figure that a sugar dealer has to beat or to match in order to sell sugar" (R. 104).

That evidence fairly warrants a comparison (1) of appellees' average "profit" of 42 cents per 100 pounds (maximum 49 cents generally 39.2 cents or above) with (2) the carload freight rate of 69 cents, and with (3) the average dealer return of 25 to 35 cents. Since appellees' "profit" falls midway between items (2) and

(3) and is substantially in excess of normal dealer return, it is a fair conclusion that appellees' "profit" is a bargain transportation charge designed to undercut the tariff rates of authorized rail and motor carriers. As the Commission said (R. 30):

"... we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such."

**THE DISTRICT COURT FAILED TO CONSIDER THE DIFFERENCES BETWEEN APPELLEES' TWO ENTERPRISES.**

The District Court (R. 165-167) not only failed to mention or consider section 203(c), but it also did not refer to or take into account the primary business test of the *Lenoir Chair-Brooks* case (note 1 *supra*). The Court took no notice whatsoever of the differences between appellees' mercantile business transacted through the warehouse and the long-haul truckload transportation of sugar directly from the refinery to the consumer. For example, a reading of the Court's opinion by one unacquainted with the record would leave the impression that all of the sugar is carried to the warehouse and stored there awaiting sales. Likewise there is no mention of the fact that truckload sugar is hauled from the refinery to consumers *only* when an empty truck that has carried an outbound load is seeking a return load and is thus entering the transportation business in order to avoid the cost of an empty back haul. These and the other indicia of for-hire transportation set forth above and reviewed in the Commission's Report (R. 17-31) received no consideration in the Court's opinion (R. 165-167).

### APPELLEES HAVE NO "TECHNICAL DEFENSE"

Appellees allege that they have never been charged with a violation of section 203(c) and that they have therefore a "technical defense" against its application to them in this proceeding. There is no merit in this claim. The amendment of (August 12) 1958, 72 Stat. 568, 574, was enacted between the time the Examiner's proposed report was filed on August 29, 1957 (R. 9), and the date the report of Division 1 of the Commission was served, August 11, 1959 (R. 17), and therefore applies to appellees' operations here involved. *Ziffrin v. United States*, 318 U.S. 73, 78 (1943).

### CONCLUSION

The decision of the District Court should be reversed with directions to reinstate the Commission's report.

Respectfully submitted,

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Dated: April 10, 1964

Attorneys for Appellants

## APPENDIX A

The following intervening defendants in the Court below do hereby participate as appellants in this reply Brief:

- (1) Red Ball Motor Freight, Inc.
- (2) Brown Express, Inc.
- (3) Texas-Arizona Motor Freight, Inc.
- (4) Central Freight Lines, Inc.
- (5) The Atchison, Topeka and Santa Fe Railway Company
- (6) Chicago and North Western Railway Company
- (7) Chicago, Burlington & Quincy Railway Company
- (8) Chicago Great Western Railway Company
- (9) Chicago, Milwaukee, St. Paul and Pacific Railroad Company
- (10) Chicago, Rock Island and Pacific Railroad Company
- (11) Great Northern Railway Company
- (12) Illinois Central Railroad Company
- (13) The Kansas City Southern Railway Company
- (14) St. Louis-San Francisco Railway Company
- (15) Soo Line Railroad Company
- (16) Union Pacific Railroad Company
- (17) Wabash Railroad Company
- (18) The Western Pacific Railroad Company
- (19) Texas Tank Truck Carriers Association, Inc.
- (20) Regular Common Carrier Conference of American Trucking Associations, Inc.